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When the Walls Come Tumbling Down: The Demise of the Northwest Power Act

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I. Introduction

This Article examines the Pacific Northwest Electric Power Planning and Conservation Act of 1980¹ (the "Northwest Power Act" or the "Act"). The Act codifies a complex, interrelated, and interdependent series of entitlements and public benefits which have in common one feature: they are all paid for by the ratepayers of the Bonneville Power Administration (BPA), a wholesale power marketing agency of the Department of Energy.² That is the bad news. The good news is that the ratepayers and certain public interests located within the Pacific Northwest are also the beneficiaries.

Providing public benefits or administering entitlements has never been a problem for BPA. In fairness, allocating such benefits is an underlying agency statutory purpose.³

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The views expressed are those of the author and do not reflect the views of the Bonneville Power Administration, the Department of Energy, or the United States.

1. Pub. L. No. 96-501, 94 Stat. 2697 (1980) (codified at 16 U.S.C. § 839-839h (1994)).

2. The Bonneville Power Administration (BPA) was originally an agency of the Department of Interior. S. REP. NO. 164, 95th Cong., 1st Sess. 29-30 (1977) (accompanying S. 826, Department of Energy Organization Act). It was transferred to the Department of Energy in 1977 when the Department was established by Congress in order to assure a coordinated national energy policy. S. REP. NO. 95-91, 95th Cong., 1st Sess. 302, 91 Stat. 565 (1977) (codified at 42 U.S.C. § 7101-52j (1994)). Bonneville must charge rates for its power and transmission services that repay in full the cost of its power and transmission facilities. Section 7 of the Bonneville Project Act of 1937 specifies that "[i]t is the intent of Congress that rate schedules ... shall be drawn having regard to the recovery ... of the cost of producing and transmitting such electric energy, including the amortization of the capital investment over a reasonable period of years." 16 U.S.C. § 832f (1994). See also § 9 of the Federal Columbia River Transmission System Act of 1974 providing that rates established shall have due "regard to the recovery ... of the cost of producing and transmitting such electric power, including the amortization of the capital investment allocated to power over a reasonable period of years." 16 U.S.C. § 838g (1994). The regulations establishing BPA's financial reporting and detailing the "cost recovery criteria" are set forth in U.S. Department of Energy Order 6120.2 (September 20, 1979).

3. The list of public benefits is a long one. The following examples are illustrative but not complete. The original Bonneville Project Act of 1937 (codified at 16 U.S.C. § 832-832l (1994)) provides that the generation of electric energy shall be operated "for the benefit of the general public, and particularly of domestic and rural consumers." 16 U.S.C. § 832c(a) (1994). This "preference and priority" for "public bodies and cooperatives" has since been extended to the entire Pacific Northwest through the Pacific Northwest Consumer Preference Act of 1964, 16 U.S.C. § 837(a)-(c) (1994), and to the citizens of the State of Montana through the Hungry Horse Dam Act of 1944, Pub. L. No. 78-329, § 593a-b, 58 Stat. 270 (1944) (amended 1958). The rates for BPA's power are based on the "postage stamp" principle; that is, rates are "uniform throughout prescribed transmission areas in order to extend the benefits of an integrated transmission system and encourage the equitable distribution of the electric energy." 16 U.S.C. § 832e (1994). Rates are also to be "the lowest possible rates to consumers consistent with sound business principles." 16 U.S.C. § 838g (1994). See § 5 of the Flood Control Act of 1944,

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And so long as BPA's role as the primary, low cost, Pacific Northwest power purveyor was unchallenged, these benefits could be paid for. What has changed is the deregulation of the utility industry, a deregulation which eliminates BPA's monopoly power and places its financial condition on red alert⁴ while it undergoes the necessary change.⁵

In the process, BPA's ability to continue providing public benefits has come into serious question.⁶ The Act's fish and wildlife entitlement is currently receiving the most public attention, but benefits for public and private utilities, irrigators, and large industry are also costly and undergoing scrutiny.⁷ Everyone supports BPA's efforts to control costs, provided that their own special package of benefits is not at risk. What is a "subsidy" for one group is a "God given right" for another, but whether you call it a "helping hand" or a "hand out" the result is the same: to drive up rates and make BPA less competitive.⁸ Cumulatively, this poses a difficult, but not impossible, challenge.

The Article looks at BPA's costs under the Act, including those in the rapidly growing fish and wildlife area where the influence of the Endangered Species Act is an expensive and complicating factor. It tests some of the key assumptions that underlay the Act's passage against the test of time, and finds them lacking. Finally, it suggests possible administrative and legislative options to assure BPA's survival, assuming that BPA's survival is in the best interest of the Pacific Northwest.⁹ On that key question, opinions vary. However, the central premise of this Article is that while BPA must change to adjust to an increasingly competitive electric utility market, it is imprudent to privatize or otherwise dismantle one of the few Federal agencies which conduct its operations consistent with sound business principles, and repays with interest the taxpayer investment in its system. For more than sixty years BPA has effectively implemented its primary statutory purposes. These include (1) serving as a "yardstick" to assure that all Northwest utilities, includ-

16 U.S.C. § 825s (1994), as construed to apply to Bonneville in 41 Op. Att'y. Gen. 236 (1955) and later expressly applied in § 9 of the Federal Columbia River Transmission System Act of 1974, 16 U.S.C. § 838g (1994).

The original preference and price benefits are not alone. To encourage irrigated agriculture, BPA was also directed to absorb within its rates any costs "beyond the ability of the irrigation water users to repay." 16 U.S.C. § 835k (1994).

Other public benefits are discussed *infra*.

4. See generally BONNEVILLE POWER ADMINISTRATION, DOE/BP-2521, 1994 ANN. REP. (1995); BONNEVILLE POWER ADMINISTRATION, DOE/BP-2800, 1995 ANN. REP. (1996) [hereinafter "BPA 1994 ANN. REP." and "BPA 1995 ANN. REP." respectively]. BPA's financial condition has somewhat improved. While BPA ended 1995 with revenues of \$196 million, a 16% increase from 1994, the outlook is now more positive. BPA expects \$338 million in revenues by the end of 1996. BPA 1995 ANN. REP., *supra*, at 21.

5. BPA has been designated a "reinvention laboratory" as a part of the Clinton Administration's "National Performance Review" plan to reinvent the federal government. BPA has also separately contracted with the National Academy of Public Administration (NAPA). NAPA's 1993 report to BPA, REINVENTING THE BONNEVILLE POWER ADMINISTRATION (1993), has significantly influenced BPA's recently published business plan and the government corporation legislation which is being discussed within Congress and the Clinton Administration. See BONNEVILLE POWER ADMINISTRATION, DOE/BP-2664, BUSINESS PLAN (1995) and accompanying BONNEVILLE POWER ADMINISTRATION, DOE/EIS-0183, BUSINESS PLAN FINAL ENVIRONMENTAL IMPACT STATEMENT (1995), [hereinafter "BPA Business Plan" and "BPA Business Plan FEIS," respectively].

6. The Northwest Power Planning Council (NWPPC) has issued a paper addressing BPA's future. See NORTHWEST POWER PLANNING COUNCIL, DOC. NO. 95-14, STAFF ISSUE PAPER: THE ROLE OF THE BONNEVILLE POWER ADMINISTRATION IN A COMPETITIVE ENERGY MARKET (1995). Under separate cover the NWPPC has also circulated a July 19, 1995 letter from Mr. Brett Wilcox, President of the Northwest Aluminum Company. Letter from Brett Wilcox, President, Northwest Aluminum Company, to Randy Hardy, Administrator, Bonneville Power Administration (Jul. 19, 1995)

(on file with Northwest Power Planning Council). Mr. Wilcox, an attorney, represented large aluminum companies when the Northwest Power Act of 1980 was considered by Congress.

7. See NORTHWEST POWER PLANNING COUNCIL, *supra* note 6.

8. See BPA BUSINESS PLAN FEIS, *supra* note 5 chs. 1, 1.1.

9. BPA and the Department of Energy have called for a "regional and comprehensive review of BPA's role and structure in the Pacific Northwest" for many of the same reasons set forth in this Article. Press Release from U.S. Department of Energy, at 1 (Sept. 28, 1995) [hereinafter DOE Press Release]. The review is currently ongoing, and will include reexamination of the Northwest Power Act of 1980 and BPA's other organic statutes recognizing the need for change because of the changed regulatory environment. That same review is referenced in the Conference Report accompanying H.R. 1905, together with a call for greater regional control of fish and wildlife resources through increased reliance on the Northwest Power Planning Council's Fish and Wildlife Program. H.R. CONF. REP. NO. 1905, 104th Cong., 1st Sess. 93 (1995).

At the same time, U.S. Senator Slade Gorton (R-WA) has initiated a parallel and complementary process "to develop legislation to rewrite the Northwest Power Act," and sent a letter to selected individuals asking for their views on ten key questions. Letter from Senator Slade Gorton (Jan. 18, 1996). Senator Gorton's own views were set forth on the same day. His five goals include (1) regional control over fish and wildlife, (2) creation of an energy system that better serves Northwest consumers; (3) reform of the Northwest Power Act; (4) equal access to the BPA transmission system; and (5) reexamination of existing programs. Senator Slade Gorton, Statement before The Energy Conference (Jan. 18, 1996). The Gorton initiative is particularly important because with the retirement of Senator Mark Hatfield (R-OR), Senator Gorton will be the ranking northwest Republican member on the Appropriations Committee that reviews BPA's budget. Senator Gorton's goal of crafting a legislative package that fairly balances economic and environmental interests will be challenging, as will the integration of the governors' "Regional Review" recommendations into such a package.

ing BPA competitors, provide consumers the lowest possible electric rates; (2) providing a high quality, reliable transmission system stretching from Canada to California with access for all users; and (3) investing billions for social benefits such as conservation, renewable resources, and fish and wildlife protection.

However, with respect to the Northwest Power Act, the Article concludes that most, if not all of the Act's assumptions are invalid; that those assumptions supported a fiscally imprudent and overly generous set of benefits; and that time has shown that the Act's passage was largely unnecessary. The hope is that if Congress chooses to enact new legislation, it will not repeat previous mistakes by passing another highly structured, extremely complex, and technical law whose sponsors are convinced that they can foresee the future. The "Code Napoleon" approach which seeks to anticipate every contingency may work well for the French. It has not worked for BPA, nor is it a good model for the utility industry. Unexpected events inevitably lay waste to laws written by legislators who presume they can foresee the future.

II. Overview

BPA was born in 1937, a child of the Roosevelt Administration.¹⁰ BPA's statutory mission was to sell bulk power, provide transmission services and to encourage competition in the

electric utility business in the Pacific Northwest.¹¹ Private utility rates were viewed as exorbitantly high, and private utilities were understandably reluctant to serve many rural areas because of the high costs of doing business associated with serving low density areas. Bonneville was to be a "yardstick" against which private utility service would be measured, with a preference and price structure that would encourage the formation of public utilities and cooperatives to compete with private utilities and serve areas they were unwilling to reach.¹²

Bonneville is governed by four organic statutes. The Bonneville Project Act of 1937 is BPA's original organic statute.¹³ Modeled after the Boulder Dam Act and the Tennessee Valley Act,¹⁴ the Project Act sets forth broad guidelines and policies, and entrusts to the BPA Administrator a great deal of discretion.¹⁵ For instance, the Administrator is to "act consistent with sound business principles" and repay the federal investment in the Federal Columbia River Power System. "Subject only to the provisions of this Act," the Administrator may "enter into such contracts, agreements, and arrangements, ... and make such expenditures ... upon such terms and conditions as he may deem necessary."¹⁶ Public agencies are entitled to preference for and priority to federal power.¹⁷ The Act was amended only once, and then for the purpose of increasing the Administrator's discretion to assure that BPA could act in a business-like manner, free of the normal constraints that bind federal agencies.¹⁸

10. See GUS NORWOOD, DEPARTMENT OF ENERGY, DOE-BP-7, COLUMBIA RIVER POWER FOR THE PEOPLE: A HISTORY OF POLICIES OF THE BONNEVILLE POWER ADMINISTRATION 796-874 (1981). Norwood recounts President Franklin D. Roosevelt's relationship to BPA: "The Great Depression triggered major Federal development of the Columbia River when President Roosevelt approved starting construction of Grand Coulee and Bonneville dams in 1933 to provide jobs." *Id.* at 29. By approving the construction project, President Roosevelt fulfilled a promise made in Portland, Oregon in a September 21, 1932 presidential campaign speech: "We have ... the vast possibilities of power development on the Columbia River. And I state, in definite and certain terms, that the next great hydroelectric development to be undertaken by the Federal government must be on that Columbia River." *Id.* at 26.

11. The Bonneville Project Act of 1937 is clear and unambiguous as regards its purposes. The Administrator "shall make all arrangements for the sale and disposition of electric energy." 16 U.S.C. § 832(a) (1994). He is "authorized and directed to provide, construct, operate, and maintain such electric transmission lines and substations as he finds necessary" for this purpose. *Id.* § 832a(b). And in making these sales and providing transmission facilities he is "to encourage the widest possible use of all electric energy that can be generated and marketed and to provide reasonable outlets therefor, and to prevent monopolization thereof by limited groups." *Id.*

12. See NORWOOD, *supra* note 10, at 64-68 (discussing formation of key BPA power policies which have guided BPA, including preference and priority for public bodies and "postage stamp" wheeling rates to assure that all BPA customers paid the same rate no matter how distant they were located from the dams that produce the power).

13. 16 U.S.C. § 832-832I (1994).

14. See the testimony of Secretary of Interior Harold L. Ickes during a May 10, 1937 hearing before the House Committee on Rivers and Harbors. Congressman Golden asked the Secretary: "Your position is ... that you want Bonneville under the same sort of administration that we now have at Boulder Dam and that you propose to have at Grand Coulee, and somewhat similar to the TVA?" *Id.* The Secretary replied: "That is right." Columbia River (Bonneville Dam), Oreg. and Wash., 1937: Hearing on H.R. 7642 before the Committee on Rivers and Harbors, 75th Cong., 1st Sess. 153 (1937).

15. The Administrator's contracting authorities are illustrative. He is authorized, "[s]ubject only to the provisions of this Chapter, ... to enter into such contracts, agreements, and arrangements, ... and to make such expenditures, upon such terms and conditions and in such manner as he may deem necessary." 16 U.S.C. § 832a(f) (1994).

16. *Id.*

17. *Id.* § 832c(a)-(d).

18. See Pub. L. No. 75-329, 50 Stat. 731 (1937) (codified at 16 U.S.C. § 832a(f) (1994) (offered by then Congressman, and later Senator, Henry M. Jackson (D-WA)). The Senate Report from the Committee on Commerce noted that BPA is "a regional agency" which "must be as free as possible to deal with problems which are essentially local matters. That Department exercises supervision only where major policy considerations are involved and leaves the administration of the policies to the Bonneville Power Administrator. [This legislation] is based on the same principle." S. REP. NO. 469, 79th Cong., 1st Sess. 4 (1945).

In short, when Congress created BPA it created a unique federal agency with both bureaucratic and business attributes. The "left brain bureaucracy" and "right brain business" statutory framework within which BPA operates explains much of its history and policy development.¹⁹ When power and transmission revenues are high, BPA spends money freely and creates programs which raise customer and interest group expectations. When revenues fall off, and programs must be cut to assure an ability to meet Treasury repayment obligations, there is discord.

Whereas the Bonneville Project Act created a preference right to BPA power for public utilities, the Northwest Preference Act enacted in 1964 expands on the concept of preference by creating a geographic preference and priority to Bonneville power for all Northwest purchasers.²⁰ The Act also facilitated construction of the Pacific Northwest-Pacific Southwest Intertie and ratification of a U.S.-Canadian Treaty that assured construction of large power dams on the Columbia River which both nations share in common.²¹ It also governed allocation of resulting power benefits.²²

The Federal Columbia River Transmission System Act of 1974 (FCRTSA) established BPA as the regional provider of large electric transmission services.²³ Of equal importance, it also frees BPA

from the normal restraints of an appropriated agency by making it self-funded and grants to it certain attributes of a Government Corporation.²⁴

The Northwest Power Act of 1980 is the fourth BPA organic statute and the focus of this Article. The Act became law at a time of regional turbulence in the electric utility business. BPA had earlier supported the Corps of Engineers and Bureau of Reclamation in their construction of all cost effective hydroelectric resources on the Snake and Columbia Rivers, and was the exclusive marketing agent for the power produced by those dams.²⁵ BPA had also entered into certain contracts with the Washington Public Power Supply System and the Eugene Water and Electric Board to acquire the capability of nuclear resources,²⁶ and signed long-term exchange agreements with southern California utilities. These contracts were signed in the expectation that they would provide the BPA's customers a long-term, reliable power supply.

Load forecasts, however, showed that despite BPA's best efforts the region was running out of power. Demand would exceed supply unless prompt action was taken.²⁷ Since public bodies entitled to preference had first call on BPA power, others were told that their contracts would not be renewed. Notices of insufficiency were issued to private utili-

19. *Portland Gen. Elec. Co. v. Johnson*, 754 F.2d 1475 (9th Cir. 1985). *Portland General Electric* shows the latitude the courts will allow BPA to operate consistent with sound business principles, notwithstanding regulatory directives that are sometimes highly prescriptive. In this case, BPA sold its direct service industry customers, largely aluminum companies, an amount of surplus power, arguably without complying with the rate procedures of the Northwest Power Act. *Portland General* argued that the rate was unreasonable because it did not assure BPA would recover its costs and therefore losses would be passed along to *Portland General* and other BPA customers in the form of higher rates. Holding in favor of BPA, the court concluded that although BPA did not invoke ratemaking proceedings, "it was faced with the distinct possibility that it would soon spill water over its dams and thereby forego the sale of the energy." *Id.* at 1482. Therefore, because some revenues were better than no revenues and because "unemployed workers could be rehired and the ailing economy of the Pacific Northwest ... [given] a needed boost," it was "in the interest of all parties that BPA enter into the challenged transactions." *Id.*

20. 16 U.S.C. ch. 12F (1994). "Our strategy was to devise a bill to assure preference for BPA power would remain in the Pacific Northwest" said Charles Luce, former Bonneville Administrator. Charles F. Luce, Keynote Address at the Pacific Northwest Utilities Conference Committee Annual Meeting (Nov. 18, 1988). During hearings before the Irrigation and Reclamation Subcommittee of the House Interior Committee, Luce supported regional preference on the grounds that Northwest industries had a vested interest in cheap power and that it would be useful to have a "defined market area." *Id.*

21. See *NORWOOD*, *supra* note 10, at 237-46 (discussing the construction of the west coast interties to California and the relationship to regional preference legislation).

22. 16 U.S.C. § 837(a)-(h) (1994).

23. 16 U.S.C. §§ 838-838k (1994).

24. Congress approved the FCRTSA in April, 1974. It stemmed from difficulties in carrying out long-range planning associated with the hydrothermal power plant program in the face of year-to-year Congressional appropriations. When President Ford signed the bill in October, 1974, he described it as a "solid step forward in meeting our energy requirements on an orderly, planned basis." GENE TOLLEFSON, DEPARTMENT OF ENERGY, *BPA AND THE STRUGGLE FOR POWER AT COST* 358 (1987).

25. 16 U.S.C. § 838f (1994).

26. The Washington Public Power Supply System (WPPSS) owns several nuclear projects. BPA acquired 100% of the capability of nuclear projects 1 and 2 pursuant to net billing agreements with WPPSS and public utilities. BPA also acquired 70% of the capability of project 3 pursuant to net billing agreements with certain investor owned utilities. For a summary of these and related agreements see *WASHINGTON PUBLIC POWER SUPPLY SYSTEM, PROJECTS NOS. 1 AND 3 REFUNDING ELECTRIC REVENUE BONDS 1-17* (Dec. 15, 1989) [hereinafter *WPPSS PROJECTS NOS. 1 & 3*]. For a general description of conditions leading to net billing arrangements, see H.R. REP. NO. 976, 96th Cong., 2d Sess. 28-30 (1980).

27. See H.R. REP. NO. 976, *supra* note 26.

In June of 1976, BPA recognized that Federal power, including the "net billed" power, would be inadequate to meet the projected needs of its preference customers, and issued notices of insufficiency to its customers. This relieved BPA from liability for any failure to satisfy preference customer load growth after July 1, 1983. Similarly, BPA informed its direct service industry customers that their contracts expiring in the 1981-91 period were not likely to be renewed.

Id. at 25. See also *id.* at 30.

ties and the BPA's large direct service industrial customers, primarily aluminum companies.²⁸ They would not get new contracts when their existing contracts expired. The aluminum companies threatened to take service directly from their local utilities, who were largely public utilities, thereby exacerbating the BPA's ability to meet all preference customer loads.²⁹ At the same time, existing public utilities were alarmed that newly formed or proposed public utilities might compete with them for a share of BPA's low-cost resources, thereby shrinking the preference slice of the power pie even further. One such quasi-utility, the State of Oregon's Domestic and Rural Power Authority, threatened to lay claim to a block of power large enough to serve all domestic and farm load in the State of Oregon.³⁰

As the situation deteriorated in the late 1970s, BPA proposed an "allocation scheme" which satisfied almost no one.³¹ Private utilities, who were purchasing large blocks of BPA power, would no longer receive power. Their residential and farm consumers were already paying nearly twice the rates charged by adjoining public utilities. Public utilities, however, were not happy either. They would not have all of their power needs met. They would be forced to acquire additional resources or purchase power on the open market at a cost far in excess of what BPA

charged. Finally, large industries would have only a portion of their load served, and that by a new class of power of a lower quality and therefore less likely to be claimed by preference utilities. Lawsuits were quickly filed by political leaders in private utility service areas.³² BPA's public utility and industry customers intervened to protect their interests.³³

A crisis swept the Northwest electric industry because BPA provided more than fifty percent of all electricity sold in the four-state area of Oregon, Washington, Idaho and western Montana.³⁴ And electricity's availability and price significantly influenced the entire economy. California utilities were also increasingly dependent on BPA power which was provided to them across the large Pacific Northwest-Pacific Southwest Intertie. The problem was perceived to be political, and utility executives looked to their political leadership for solutions.

BPA's fundamental dilemma was that its statutory authority included only implied authority to acquire new resources.³⁵ Those new resources could only serve to "firm up" or support the more efficient use of existing hydroelectric power. Express statutory authority to acquire new resources to meet load was lacking.³⁶ A major initiative was mounted to provide BPA the statutory authority to do what was perceived as necessary: acquire resources to

28. *Id.* The House Report also notes:

BPA, in furtherance of its belief that Federal power would not be adequate to meet the projected demands of its preference customers, issued Notices of Insufficiency to these customers. These notices had the legal effect of relieving load growth needs after July 1, 1983. BPA also informed its DSI customers that it would probably not be able to renew their power sale contracts when they expire in the period from 1981 to 1991 since it will need the energy "freed up" with the expiration of those contracts to meet the growing requirements of its preference customers, which, by virtue of the preference clause, have first right to it.

Id. at 30.

29. *Id.* at 25, 31.

30. The Bonneville Project Act calls for preference to public bodies and cooperatives, and directs that the hydroelectric projects should be operated "for the benefit of the general public, and particularly of domestic and rural consumers." 16 U.S.C. § 832c(a) (1994). The dilemma was that the states of Idaho and Oregon, while rich in "domestic and rural consumers," were served primarily by private utilities who had no right to preference power. H.R. REP. NO. 976, *supra* note 26, at 27. Gene Tollefson recounts:

On February 20, 1978 Robert Straub and John Evans, the Governors of Oregon and Idaho, respectively, declared that BPA "must honor the commitments in acts of Congress that domestic and rural customers have first call on energy from Federal dams that are even more basic than what BPA calls preference customers."

TOLLEFSON, *supra* note 24, at 371. They supported creation of a Domestic and Rural Power Authority to lay claim to this power. *Id.* See H.R. REP. NO. 976, *supra* note 26, at 25-26.

At the same time, the States are looking for ways to qualify their residential customers for a share of ... resources. In this respect, the State of Oregon has formed a "Domestic and Rural Power Authority" (DRPA) which has applied to BPA for an allocation of power. DRPA is intended to qualify as a preference customer in order to obtain low cost power to serve all residential customers throughout the State.

See also *Id.* at 30:

Additional power planning uncertainties arose on July 28, 1977, when legislation was enacted in the State of Oregon creating the Oregon Domestic and Rural Power Authority (DRPA). This legislation is intended to make the entire State of Oregon a preference customer of BPA for the purpose of securing a pro rata share of Federal hydro sufficient to meet the total demands of Oregon domestic and rural consumers.

31. Governor Dixie Lee Ray of Washington declared herself "against reallocation of our hydroelectric supplies by taking away from Washington states" and giving it to Oregon and Idaho." TOLLEFSON, *supra* note 24, at 371. See also H.R. REP. NO. 976, *supra* note 26, at 25, 30-31.

32. See H.R. REP. NO. 976, *supra* note 26, at 30.

33. *Id.*

34. *Id.* at 26, 36-40, 64.

35. See *Id.* at 36-40 (discussing "removal of BPA restriction on acquisition or purchase of power to meet needs").

36. *Id.* at 36. "BPA and others believe new authority for resource acquisition is an essential piece of this legislative solution. Without such authority, BPA asserts that the amount of power available to BPA is fixed." *Id.*

meet what was felt to be burgeoning residential and industrial load growth. These newer, albeit more expensive resources, could be melded with lower cost, existing hydropower to produce a uniform class of power that would be sold at a rate that assured the Pacific Northwest's continued economic prosperity.³⁷

III. The Northwest Power Act: A Study in Public Benefits and Entitlements

A. Setting The Scene

The Northwest Power Act did not have to be the lengthy, technical, complex law that was enacted. Some envisioned it as a one-sentence bill expressly authorizing BPA to acquire new power to serve growing load.³⁸ But that would have been far too easy and far too logical. More importantly, it would not have met the stakeholders' deep-seated desire to guarantee in law all of their existing benefits and, if possible, lay claim to a few more. In the process, old entitlements were ratified and new ones created.

Like a "ponzi" scheme, these entitlements could be paid for only so long as BPA's sales generated adequate revenues. With the passage of the Energy Policy Act of 1992,³⁹ BPA's position as the preeminent power wholesaler in the Pacific Northwest was significantly eroded. Competition and access to lower cost, alternative resources brought load loss.⁴⁰ Load loss and additional commitments of water for Endangered Species Act purposes led to reduced revenues. With revenues reduced it became increasingly difficult to both repay the Treasury and support the entitlements and benefits. Together with extraordinarily high levels of debt from earlier failed nuclear projects,⁴¹ BPA is faced with a financial crisis.⁴²

The future, however, was not so clear in 1978 when the Northwest Power Act was first proposed. The late U.S. Senator Henry M. "Scoop" Jackson was the senior statesman responsible for overseeing BPA. As Chairman of the Senate Energy and Environmental Affairs Committee, Jackson com-

manded the power and the respect of the regions utility and industry leaders. As a primary author of the National Environmental Policy Act, he was also a statesman with credibility among environmental advocates. More importantly, perhaps, was the fact that 80 percent of the power sold in "Scoop's" home state was sold by BPA. In a very real sense, the economy of the State of Washington was linked to BPA prosperity. With Jackson's former chief of staff Sterling Munro serving as BPA's Administrator, and a full blown crisis of too little power and too much load, the stage was set.

BPA's customers carefully weighed their options. Under the best case scenario, some but not all could have an administrative allocation of power to meet part of their load, and be left to acquire additional resources themselves.⁴³ This would require risk and the expenditure of capital: the risk of building resources and the cost of selling bonds. These were not happy prospects for elected utility commissioners, nor for private utilities and industries which understandably prefer to keep debt low. Under the worst case alternative, they would get no BPA power and be required to acquire all new, higher cost resources. Alternatively, BPA could acquire additional resources for everyone. This would create new federal agency debt, which would not appear on BPA customer ledger sheets. Hopefully, it would also reduce the overall cost of resources by continuing with one primary supplier. The savings would be passed along to BPA customers. Now here was an attractive alternative. It did not take a rocket scientist to determine which way the political winds were likely to blow.

BPA's customers, however, were a suspicious lot. They wanted the benefits, but they did not trust a strong BPA. They feared that the new resource acquisition authority would make the Administrator a "power czar" which could lead to his treating them unfairly.⁴⁴ Accordingly, they took every opportunity to reduce this risk by specifying, in excruciating detail, exactly what the Administrator could and could not do. Their attempt was to limit the flexibil-

37. BPA power sales reflect the nature of the power: firm, non-firm, and others. They are not tied to the generation from which the power is produced. BPA rates are melded and set to recover the total costs, including amortization of federal base system. *Id.* at 68, 87.

38. Discussions of author with Robert Ratcliffe, former General Counsel and Deputy Administrator, Bonneville Power Administration, during the pendency of the Northwest Power Act before Congress, in Portland, Oregon, mid-1979.

39. Pub. L. No. 102-486, 106 Stat. 2776 (1992).

40. See BPA 1994 ANN. REP., *supra* note 4; BPA 1995 ANN. REP., *supra* note 4. See also Anthony Effinger, *Up Against It, BPA Learns How to Compete*, OREGONIAN, Mar. 24, 1996, at B1 ("[BPA Administrator]

Hardy, a 20-year veteran of the power industry, said his darkest days came one week last April when customers accounting for 200 megawatts of power worth \$50 million in annual sales abandoned the BPA.").

41. See BPA 1994 ANN. REP., *supra* note 4; WPPSS PROJECTS Nos. 1 & 3, *supra* note 26.

42. See generally BPA 1994 ANN. REP., *supra* note 4; BPA 1995 ANN. REP., *supra* note 4.

43. See H.R. REP. NO. 976, *supra* note 26, at 31.

44. See James O. Luce & Janet W. McLennan, *Acquisition of Energy Resources Under the Pacific Northwest Electric Power Planning and Conservation Act: A Look at the Future*, 5 U. PUGET SOUND L. REV. 61, 96 (1981).

ity and discretion that Congress had originally entrusted to BPA under the Bonneville Project Act and earlier laws, a discretion which had been used to help put them in business but was now seen as too far-reaching.⁴⁵

B. Put on the Handcuffs and Pour the Gravy Over the Grits: The Story of the Northwest Power Act

BPA's customers set about their task with zeal and enthusiasm. BPA could acquire the resources they needed but the resources would be of two classes: major and non-major.⁴⁶ For major resources, BPA was required to undertake a complex and lengthy process of hearings with the final decision being entrusted to the Northwest Power Planning Council,⁴⁷ an interstate compact created by Congress to prepare a power and fish and wildlife mitigation plan.⁴⁸ The only appeal from a Council recommendation not to acquire a major resource was to Congress,⁴⁹ and it was presumed that if the Governor's representatives would not approve a resource, that decision would not be overturned in Washington D.C.

The customers did not stop with resource acquisition authority. That was only the spring board. Each special interest group had its own set of non-negotiable benefits. All customers, especially the Idaho Power Company, were leery of BPA's ability to set rates. Accordingly, they persuaded Senator James McClure (R-ID) to specify in detail the rate process to be used.⁵⁰ The ability to act quickly to

respond to changing circumstances was taken away. Lengthy processes were established. The private utilities argued that BPA rate procedures should be at least the equivalent of those they faced at State Public Utility Commissions to create a level playing field.⁵¹ The standard of review for rates was set accordingly, and the statute attempted to specify exactly what costs could be borne by which rate groups, or "pools."⁵² Not surprisingly, the "new resource" rate for those not already a part of the BPA system would be the highest.⁵³

Public utilities wanted to make sure that their preference to BPA power would be protected, and they were not adverse to putting a damper on the ability of others to form new public utilities or to solidify their ability to hang onto their own local industry by establishing BPA rate structures that would make it uneconomical for large industry to move.⁵⁴ They also wanted assurances that they alone would be entitled to the benefits of the "federal base system" that existed on the date of the passage of the Act. In other words, all existing, presumably low-cost resources would be reserved for them, with preference extended to include not only supply but also price.⁵⁵

Private utilities, on the other hand, argued that their consumers should not be disadvantaged by an outdated preference concept that was intended to allow public utilities to get into business 40 years earlier, but which had long since served its purpose. They would give public utilities a continued right to

45. For example, Congressman Weaver (D-OR), the leading opponent of the Northwest Power Act, opposed the legislation for several reasons, including distrust of BPA. On November 12, 1980, in debate before the House of Representatives, he stated:

[N]o consensus exists, Mr. Chairman ... The four public utilities in Oregon oppose the bill strongly. The Eugene Water and Electric Board, the largest public utility in Oregon, adamantly and strongly opposes the bill.

Under this bill ... initiative by the Eugene Water and Electric Board would be destroyed. ... [It] empowers an existing Federal bureaucracy—the Bonneville Power Administration—with vast new powers to mandate any project that this Federal agency decided upon ...

What this bill is about is simply to empower the Bonneville Power Administration to mandate to all utilities whatever this Federal bureaucrat decided upon.

126 CONG. REC. H10,517 (daily ed. Nov. 12, 1980) (statement of Rep. Weaver). Congressman Weaver was not beyond taking license with the facts to argue his point. The distrust of BPA's new powers, however, was very real.

46. 16 U.S.C. § 839(a)(12) (1994). For an analysis of resource acquisition authority under the Northwest Power Act, see Luce & McLennan, *supra* note 44, at 61–97.

47. 16 U.S.C. § 839d(c) (1994).

48. See Luce & McLennan, *supra* note 44, at 83–86.

49. 16 U.S.C. § 939d(c)(3) (1994).

50. See the remarks of Senator James McClure (R-ID) on August 3, 1979, and the colloquy between Senators McClure, Jackson (D-WA), and Magnuson (D-WA) on ratemaking procedures, 125 CONG. REC. S11,594–97 (daily ed. Aug. 3, 1979). The rate provisions of the Northwest Power Act are set forth at 16 U.S.C. § 839e (1994). See discussion regarding rate setting procedures, *infra*. See also S. REP. NO. 272, 96th Cong., 1st Sess. 56–79 (1979). The latter document details the "vision" of the drafters regarding rates.

51. 16 U.S.C. § 838e (1994).

52. *Id.*

53. The new resources rate is charged to "new large single loads" that exceed 10 average megawatts. It was designed with the expectation that such loads would be charged the highest possible BPA rate because, it was assumed, only high-cost resources would be in the pool from which such rates were calculated. 16 U.S.C. § 839e (1994); H.R. REP. NO. 976, *supra* note 26, at 53.

54. See H.R. REP. NO. 976, *supra* note 26, at 53.

55. See 16 U.S.C. § 839c(b) (1994); H.R. REP. NO. 976, *supra* note 26, at 33–35. The latter document's discussion entitled "Protection of the Preference Clause" makes it clear that the Committee did not intend to change preference:

[T]he intention of this Committee is clear. The Committee does not want to undo nearly 80 years of history Specific provisions ... are designed to protect the entitlement of both existing and new preference customers to the full federal base system. These provisions seek to protect preference as to both supply and price.

Id. at 34.

preference, but they insisted on rate parity for their residential and farm consumers, many of whom paid rates several times greater than their public utility counterparts.⁵⁶ BPA would be required to undertake a "paper power exchange" of its low-cost power for their higher cost power.⁵⁷ The dollars would be passed along to their domestic and rural consumers in the form of a new benefit. The public utilities agreed so long as, utilizing a complicated set of assumptions, their ratepayers would never be disadvantaged.⁵⁸ The private utilities agreed. They also agreed with the public utilities on the inherently anti-competitive scheme that would deter large industry from leaving its existing service territory, and discourage new industry from coming to the Pacific Northwest if it used BPA power.⁵⁹

Direct service industries, primarily large aluminum companies, would receive new contracts with an improved quality of service, relinquish any claim they had to taking service directly from their local utility, and help pay for many of the public and private utility benefits by paying higher rates.⁶⁰ The top quartile, or top 25 percent of their load, would receive better service, and there would be fewer restrictions on the balance of the load.⁶¹ They would also conserve energy, and assure a continued presence in the Pacific Northwest as BPA customers.⁶²

The traditional BPA stakeholder base was, for the first time, supplemented by new players: fish

and wildlife advocates, and conservation interests who urged that the cheapest "new resource" was "no resource" but instead a concerted effort to reduce load by conserving power. They saw the BPA's predicament as an opportunity to gain a seat at a table to which they perceived they had long been denied access. BPA could become a powerful and effective funder of their special needs, and serve as a laboratory for proving that environmental benefits and conservation initiatives could complement a large utility.⁶³

Conservation leaders, particularly the Natural Resources Defense Council, saw BPA as a model among large utilities for testing the concept that conservation should be considered a resource because it served to reduce the need for new generating resources that otherwise would have to have been built. Fish and wildlife advocates at federal, state, and tribal level found a friend in Congressman John Dingle (D-MI). Congressman Dingle held Senator Jackson's bill, S. 885, hostage before the House Commerce Committee until there was agreement that the Bonneville fund should be used to "protect, mitigate, and enhance" fish and wildlife affected by the development and operation of the Federal Columbia River Power System. This was an extremely powerful tool because it allowed fish and wildlife to be funded directly, without the usual checks and balances inherent in the appropri-

56. 16 U.S.C. § 839c(c) (1994).

57. *Id.* BPA may also meet its "exchange obligation" by providing "in lieu of purchasing any amount of ... power" offered by an exchanging utility, "an equivalent amount of electric power from other sources ... if the cost of such acquisition is less than the cost of purchasing the electric power offered by such utility" as part of the exchange. 16 U.S.C. § 839c(c)(5) (1994). In the contracts BPA signed with the exchanging utilities to implement the Regional Act, BPA arguably limited its ability to use this "in lieu" right. See BPA Contract No. DE-MS79-81BP9, § 4 (Aug. 22, 1981).

58. 16 U.S.C. § 839e(b)(2) (1994). See also H.R. REP. NO. 976, *supra* note 26, at 35.

59. See H.R. REP. NO. 976, *supra* note 26, at 43-44. This was a second reason for the new large, single load provision. Some members of Congress were apprehensive that BPA power would attract industry from their region to the Pacific Northwest. See *id.* The discussion is entitled "The bill's impact on other regions."

60. As noted in House Report 976:

These industries will also pay significantly higher rates under the new contracts. These higher rates permit the Administrator to enter into contracts with the region's investor-owned utilities for an exchange of power ... By providing these residential customers wholesale rate parity with residential customers of preference utilities, the amendment serves in a substantial way to cure a major part of the allocation problem.

H.R. REP. NO. 976, *supra* note 26, at 29. Not mentioned but also important was the fact that the residential exchange also undercut the formation of any new public utilities. There is no eco-

omic incentive for new publicly owned utilities if private utilities can provide the same power costs without public ownership. *Id.*

61. See the discussion of the aluminum company power service and accompanying legislative history of the Northwest Power Act found in *Aluminum Company of America v. Central Lincoln People's Util. Dist.*, 467 U.S. 380 (1984), reversing an earlier decision by the Ninth Circuit Court of Appeals on similar issues. The case is important both because of the excellent history of the BPA and the Northwest Power Act, and because it grants the BPA Administrator very significant deference in interpreting the statute. *Id.* at 391. Ironically, the court granted BPA precisely the broad discretion that the BPA customers had sought to deny the Administrator. *Id.*

62. H.R. REP. NO. 976, *supra* note 26, at 63. "Additionally, since the linchpin of this legislation is conservation and regional planning, the Committee expects that the DSI's will do their part to conserve energy..." *Id.*

63. In the fish and wildlife area, an entire "bill within a bill" is constructed in § 4(h), 16 U.S.C. § 839h (1994). The BPA Administrator is to use the BPA fund, created under the authority of the Transmission System Act, to directly fund fish and wildlife measures which "protect, mitigate, and enhance fish and wildlife to the extent affected by the development and operation" of federal hydroelectric projects. 16 U.S.C. § 839h(10)(A) (1994). By using the BPA fund, appropriations are not required and the BPA ratepayers act as benefit providers for fish and wildlife through their rates. Similarly, the BPA fund is used to fund conservation which, in addition, is given a distinct competitive advantage through the Act's "cost effective" definition. 16 U.S.C. § 839a(4)(A) (1994).

ations process.⁶⁴ And there were few limits to such expenditures prescribed by law.⁶⁵

Finally, the region's four states of Washington, Oregon, Idaho, and Montana asserted a state role in what had been viewed as a solely federal enterprise. They insisted upon and won the creation of the Northwest Power Planning Council, an interstate compact entrusted with planning responsibilities for BPA's future in power and fish and wildlife matters.⁶⁶

64. Most federal agencies appropriations must go through a normal appropriations process. BPA is different. Its budget process is far more abbreviated. The Federal Columbia River Transmission System Act provides that:

[The Administrator may make] expenditures from the [Bonneville] fund, which shall have been included in his annual budget submitted to Congress, without further appropriation and without fiscal year limitation, but within such specific directives, or limitations as may be included in appropriation acts, for any purpose necessary or appropriate to carry out the duties imposed upon the Administrator pursuant to law.

16 U.S.C.2 § 838i(b) (1994). Thus, in a real sense, the burden is shifted.

Rather than BPA having to win affirmative approval for expenditures, Congress must disapprove or limit proposed expenditures. There are, however, limitations. In the fish and wildlife area, for example, BPA must obtain express congressional approval for capital expenditures for capital projects "with an estimated life of greater than 15 years and an estimated cost of at least \$1,000,000." 16 U.S.C. § 839b(h)(10)(B) (1994). When the BPA's Transmission System Act provision regarding an abbreviated appropriations process was enacted, its purpose was to make BPA a better business partner within the utility community. It was believed that transmission projects could not be readily financed if they were subject to the vagaries of annual appropriations. *See also* H.R. REP. NO. 976, *supra* note 26, at 24.

65. 16 U.S.C. § 839b(h)(10)(A)-(C) (1994). BPA is to fund all such costs on a "system wide basis." *Id.* § 839h(10)(C). *See* H.R. REP. NO. 976, *supra* note 26, at 44-49 (detailing fish and wildlife needs). Congressman Dingle (R-MI) was the Chairman of the House Commerce Committee. *See also* the remarks of Chairman Dingle on November 17, 1980 explaining the fish and wildlife provisions. 126 CONG. REC. H10,682-84 (daily ed. Nov. 17, 1980) (statement of Chairman Dingle).

Such limits as are anticipated by law have not always been asserted. For example, the law states that "[e]xpenditures of the Administrator...shall be in addition to, not in lieu of, other expenditures authorized or required from other entities under other agreements of law." 16 U.S.C. § 839b(h)(10)(A) (1994). The provision was intended to assure that the BPA ratepayers would not pay for costs which were a pre-existing obligation of another agency, such as a state or federal fish and wildlife agency. The law also appears to contemplate that at some point in time the mitigation obligation of the Administrator for impacts caused by the construction of the federal hydroelectric projects will have been satisfied, although a continuing obligation for operation of the dams will remain. *Id.*

66. *See* 16 U.S.C. § 839b(a)(1) (1994). *See also* H.R. REP. NO. 976, *supra* note 26, at 52-59. The regional control or "governance" issue emerged again as a major issue with § 508(c) of H.R. 1905, and the accompanying Conference Report, calling for a Council study to advise the Congress on the best means to achieve greater regional control of fish and wildlife efforts. The Governors' policy goal in 1980 was to assure the states a role in planning a coordinated electric energy future, and in protecting fish and wildlife. Their frustration in 1995 is different and in many ways greater. They believe that the federal government has at times

The Council, as noted above, plays a major role in power planning, although its presence has been most significantly felt through its fish and wildlife program. The Council's program is heavily influenced by federal and state fish and wildlife agencies and tribes.⁶⁷ It "guides" but does not "direct" BPA actions.⁶⁸ If its programs had resulted in the envisioned "doubling" goal for anadromous fish, victory would have been declared.⁶⁹ In fact, however, the fish

unreasonably and ineffectually interfered with fish and wildlife mitigation under the ESA, and that since the BPA ratepayers pay directly for these programs through their rates, as opposed to the appropriations process, the Northwest should have an increased say in this area. *See* NORTHWEST POWER COUNCIL, DRAFT REPORT: PROPOSALS FOR FISH AND WILDLIFE GOVERNANCE 3-4.

67. By law, the Council must adopt the recommendations of the state and federal fish and wildlife agencies and tribes, or explain in writing why such recommendations are not adopted. 16 U.S.C. § 839b(h)(7) (1994). The issue is made more complicated by a recent court decision, *NRIC v. Council*, 35 F.3d 1371 (9th Cir. 1994). There, the court opined in *obiter dicta*:

We conclude that 839b(h) binds, more than unleashes, the Council's discretion with respect to fish and wildlife issues. Indeed, we are convinced that the fish and wildlife provisions of the NPA and their legislative history require that a high degree of deference be given to fishery managers' interpretations of such provisions and their recommendations for program measures.

Id. at 1388.

68. BPA is guided by the Council's Program and while it must act "consistent" with the Program it is not legally obligated to fulfill all of its provisions. 16 U.S.C. § 839b(h)(11)(A)(i) (1994). From time to time, the Council proposes measures which BPA elects not to implement, although this is rare. One bright line issue, however, is economic mitigation. The Council has from time to time urged BPA to compensate property owners and irrigators for impacts caused by operating the reservoirs in a manner the Council believed helped fish migration, such as "drawing down" the reservoirs to see whether the changed water conditions would benefit fish. BPA has declined to pay economic mitigation, arguing that its ratepayer's obligation is limited to "protect, mitigate, and enhance" fish and wildlife, not to make economic restitution. The provision [in the NMFS B.O.] regarding John Day anticipates economic mitigation from some source. However, funding for such mitigation must come from a source other than BPA: BPA lacks authority to provide such economic mitigation. Memorandum from Harvard P. Spigal, General Counsel, to Randall W. Hardy, Administrator, Bonneville Power Administration (Aug. 12, 1995); Memorandum from James O. Luce, Assistant General Counsel, and Philip S. Key, Attorney, to Randall W. Hardy, Administrator, Bonneville Power Administration (Mar. 9, 1995).

69. In fairness, some significant gains have been made. Upriver steelhead runs increased from an average run of 124,000 in the later half of the 1970s to an average of 363,000 fish in the later half of the 1980s. Upriver bright fall chinook runs increased from an average of 88,000 in the early 1980s to an average run of 299,000 in the late 1980s. The upriver spring chinook runs increased from an average run of 55,000 in the early 1980s to an average run of 97,000 in the late 1980s. *See* DEPARTMENT OF INTERIOR, DOE-BP-1880, TECHNICAL APPENDIX: CHARTING A COURSE FOR THE FUTURE 38 (1992). While a continuing drought, El Niño weather patterns, an unrelenting ocean and inriver harvest have since depressed those numbers, real progress has been made.

The key policy dilemma is between the Endangered Species Act goal of saving species at almost any cost, and the Council's implementation of the Northwest Power Act's goal of "doubling

and wildlife program has failed to produce anything near its anticipated benefits.⁷⁰ While supporting the largest, most expensive fish initiative in the United States, some fish runs, especially in the Snake River, have plummeted.⁷¹ This has led to what Congress had assumed would not be needed—listings under the Endangered Species Act of 1978.⁷² It has also, together with other significant factors explained below, exacerbated BPA's financial condition.⁷³

These new Northwest Power Act benefits and entitlements were additive to those already existing under earlier law for irrigation, and other non-hydro purposes.⁷⁴ BPA is to set rates that allow it to timely repay the debt to the United States Treasury, and otherwise act "consistent with sound business principles."⁷⁵ The annual repayment obligation can be deferred in times of fiscal crisis, but that is politically risky and invites increasing control of BPA affairs by Congress, the Office of Management and Budget, and other beltway overseers within the Administration.⁷⁶

The inevitable consequence was that BPA could only pay for these benefits so long as all of the Act's

assumptions withstood the test of time. Foremost among these assumptions was that BPA was the benevolent power marketing agency from whom most everyone purchased power. As shown below, the assumptions had limited staying power.

The ultimate irony of the Northwest Power Act is that less than six months after its passage, it was shown not to have been needed. The load forecasts upon which the need for the law had been built turned positive when utility economists finally recognized that the laws of price elasticity applied to electricity. There was more than enough power to serve BPA's customer needs for the foreseeable future.⁷⁷ In fact, there was so much power that the major Washington Public Power Supply System nuclear projects, begun before the Act was passed and far over budget, were with one exception, terminated.⁷⁸ In the end, a strong case can be made that the Act proves once again the adage that "if it's too good to be true, it probably is." Ironically, the Act's most vocal critic, Congressman James Weaver (D-OR), was correct in arguing that the law was not necessary.⁷⁹

the runs." The only way to "double the runs" is through increased reliance on hatchery programs and it is those very hatchery runs which are argued to adversely affect wild fish genetics. Thus, the new Council goal is to "accomplish rebuilding efforts without loss of biological diversity." See NORTHWEST POWER PLANNING COUNCIL, COLUMBIA RIVER FISH & WILDLIFE PROGRAM 4-4 (1994).

70. The Program's success has been limited, in part, because the Council has authority to guide only the federal hydro entities: the BPA, U.S. Army Corps of Engineers, Bureau of Reclamation, and the Federal Energy Regulatory Commission. 16 U.S.C. § 839b(h)(1)(A) (1994). There is no authority to require the multitude of other federal agencies, such as National Marine Fisheries Service, the Forest Service, the Bureau of Land Management, and others to "exercise [their] responsibilities, taking into account at each relevant stage of decisionmaking processes to the fullest extent practicable, the program adopted by the Council." 16 U.S.C. § 839b(h)(1)(A)(ii) (1994). Attention is needed in the forthcoming "regional review" and the governance inquiry called for by H.R. 1905, *supra* note 66, to correct this deficiency. The impacts of harvest, habitat, hatcheries, and hydro need to be looked at in an integrated way if there is to be a chance for real progress.

71. See National Marine Fisheries Service, Federal Columbia River Power System/Transportation Biological Opinion 1-4 (1995) (noting that the current population of spring summer chinook is 0.5% of its historical abundance, and that the Snake River sockeye are functionally extinct, with only one fish returning to Red Fish Lake in 1994).

72. *Id.* See also Review of Status of Upriver Columbia River Basin Populations of Pacific Salmon and Steelhead Trout, 43 Fed. Reg. 45,628 (1978).

73. See BPA 1995 Ann. Rep., *supra* note 4, at 27.

74. See BONNEVILLE POWER ADMINISTRATION, PUB. NO. WP-93-FS-BPA-02, FINAL RATE PROPOSAL 93-104 (1993) (discussing "Revenue Requirement Theory and Methodology") [hereinafter BPA FINAL RATE PROPOSAL]. BPA is obligated to pay "[a]s required by Pub. L. 89-4488 ... the portion of construction costs at Federal reclamation projects that is beyond the repayment ability of the irrigators." *Id.* at 102-03.

75. *Id.* at 93-94.

76. See CONF. REP. NO. 293, 104th Cong., 1st Sess. (1995) (report accompanying H.R. 1905). The conferees to the Water Development Appropriations Bill for fiscal year note that:

Recent actions by the Bonneville Power Administration have led to concerns that the [BPA] may not make its Treasury payment in fiscal year 1996. The conferees cannot state more strongly that failure ... to make the full annual payment to Treasury will seriously jeopardize its credibility with Congress and lead to more involvement by Congress in the management and decisionmaking of the agency.

Id. at 74.

77. See Michael Blumm, *Fulfilling the Parity Promise: A Perspective on Scientific Proof, Economic Cost, and Indian Treaty Rights in the Approval of the Columbia Basin Fish and Wildlife Program*, 13 ENVTL. L. 103, 104, 148 (1982). Professor Blumm correctly observes that "[i]n 1980 substantial electric energy deficits were projected for the Pacific Northwest for the foreseeable future ... Only two years later, however, the Bonneville Power Administration is now projecting electric surpluses throughout the remainder of the 1980s." *Id.* at 156 n.2. Professor Blumm also cites as authority the rapidly changing load forecasts that occurred in this time frame that gave rise to the surplus of electricity. *Id.* at 148 n.197. The single biggest factor for this turnaround was the recognition that electricity consumption is price-elastic, a position which was not generally accepted when the load forecasts that supported the need for the Northwest Power Act were prepared. *Id.*

78. See WPPSS PROJECTS NOS. 1 & 3, *supra* note 26, at 8-18.

79. See 126 CONG. REC. H10,674 (daily ed. Nov. 17, 1980) (remarks of Congressman Weaver):

The fight is ending. It has lasted almost 4 years. Why was it necessary to put up this great fight against the Northwest power bill? ...

... This bill is not even needed. BPA already has the authority to do conservation. BPA already has the authority to do allocation. ... What they do need the bill for the proponents do not mention. That is the forced financing of thermal plants.

IV. Mistaken Assumptions: How Could So Many Be So Wrong About So Much?

The question remains: "How could so many be so wrong about so much?" The answer, it is submitted, is that we are not as visionary as we like to think, and greedier than we care to admit. The "we" in this case is BPA, its customers, and public interest groups, all of whom benefit from or are stakeholders in BPA's future. The admonition that "for whom the bell tolls, it tolls for thee," was never more correct. While Congress shares the responsibility, it largely enacted what it was asked to pass into law. Regional legislation does not become law without widespread consensus among affected stakeholders, and the Northwest Power Act is no exception.

Hopefully, all parties have learned. Trusting the BPA may be perceived as risky business, but the lesson of the Northwest Power Act is that it is far riskier to adopt legislation, which over time and through changed circumstances, threatens to starve the very goose that lays the golden eggs which benefit you. Ironically, the original Bonneville Project Act, with its broad flexibility, would likely suffice to meet all of today's needs if the political process effectively translated the message to Bonneville and the Administrator. And if the message fails to translate, there is always the next election.

A. The Assumptions in 1980

The Act begins from a well-intentioned but arrogant premise: that its authors and contributors are sufficiently clairvoyant as to be able to predict the future with a high degree of certainty. The facts, however, are substantially different. As noted, the core assumption concerning the desperate need for more power was proven wrong only shortly after the ink had dried on the new law.⁸⁰

Of 10 key assumptions, none have withstood the test of time:

1. Assumption: BPA's customers badly needed new power resources to serve a

80. See Blumm, *supra* note 77, at 148 n.197.

81. See H.R. REP. NO. 976, *supra* note 26, at 23-32; S. REP. NO. 272, *supra* note 50, at 18.

82. For a discussion of the business changes in the electric industry that have affected BPA competitiveness, and its ability to raise rates, see BPA BUSINESS PLAN FEIS, *supra* note 5, at 1-1, 1-2.

83. The breakup is the result of a series of legal changes and engineering advances, some of which preceded passage of the Northwest Power Act. The first of these new laws was the Public Utility Regulatory Policy Act of 1978 (PURPA) and its requirement that utilities purchase "OF" resources. PURPA jump-started the independent power producing industry, and made it economically attractive to begin to develop resource alternatives to central

rapidly growing load, BPA was best able to provide them, and the Northwest Power Act would facilitate that happening.⁸¹

Fact: Before the Regional Act became law, significant deficits were forecast as inevitable. Shortly after the Acts passage, the broadly recognized and regionally supported "white book" of loads and resources changed to recognize the laws of price elasticity and showed BPA and the region surplus through the 1980s. In the intervening 16 years, BPA has used the Northwest Power Act's § 6(c) procedures to acquire only 1385aMW, 580 of which are conservation. The levelized cost of these resources varied from less than 30 mills/kwh for conservation to far more. The largest resource contract signed by BPA was the Tenaska Project for a 242 average megawatt combustion turbine at a cost of 39.5 mills per kilowatt-hour, which could escalate. Due to frustration of purpose, BPA has since withdrawn its participation in the project. Tenaska has filed suit seeking \$1,000,000,000 in damages, and the case is in arbitration.

2. Assumption: The utility industry would continue as a regulated monopoly with BPA as the central hub for providing wholesale power marketing and transmission to most Pacific Northwest utilities. This would happen because BPA rates would be substantially lower than those offered by competitors.⁸²

Fact: The deregulation movement that began with the airline and communications industries in the mid-1980s has expanded to the utility industry.⁸³ The passage of the Public Utility Regulatory Policy Act of 1978 and the Energy Policy Act of 1992 brought about a sea of change. Additionally, technological efficiencies achieved in combustion turbine engineer-

station generation. Efficiency breakthroughs in the combustion engine area, in part because of PURPA and in part because of the search for increased efficiency in airplane engines, began to make economic inroads into BPA's dominant position in the market. This was accompanied by significant new discoveries of natural gas, the decline in the fuel costs for combustion turbines, and efficiency increases which became increasingly attractive to the electric industry. Finally, there was the Energy Policy Act of 1992. The statute has particular significance for BPA inasmuch as the statute is at the heart of the Federal Energy Regulatory Commission's mega-NOPRs on Open Access Transmission and Recovery of Stranded Costs by Public Utilities. Docket Nos. RM95-8-000 and RM94-7-001, 70 FERC 61,357 (March 29, 1995). See also Solveig Torvik, *Deregulation Forces BPA Into Identity Crisis*, SEATTLE POST-INTELLIGENCER, Oct. 10, 1995, at 1.

ing and major new natural gas discoveries opened the door to competition in the wholesale power market. The deregulation of transmission has led to increased wheeling of power on the BPA Intertie and main-grid.⁸⁴ The competitiveness movement to transform BPA from a government agency to something more closely approaching a private utility⁸⁵ led BPA to agree to free many of its customers from their contracts to take service from others.⁸⁶ As this happened, BPA rates absorbed increasing nuclear, fish and wildlife, and residential exchange costs, rising significantly.⁸⁷ This occurred at the very time that the competition's prices plunged as gas markets collapsed. Not surprisingly, the result is that BPA has lost more than 700 MW of load out of a total of approximately 8000 MW of firm load in the last year, and some of BPA's large public agency and industrial customers may leave BPA or, at best, will diversify and further reduce their BPA load.

3. **Assumption:** Electricity prices would remain high. This would assure a steady stream of revenues from eager California purchasers who would purchase clean hydro power to avoid further aggravating air quality problems and running expensive thermal generation. This California gold mine would help pay for the many public benefits and entitlements contained within the Northwest Power Act.

Fact: The strategy worked for a very short while. Canadians drilled for oil in Alberta. They found no oil but discovered vast amounts of gas. California's prosperity cycled down to a major recession and demand for power dropped. Resources constructed in the Southwest to meet anticipated load growth were no longer needed. BPA's fish protection efforts resulted in increasing amounts of spill from hydroelectric projects, stretching from May–August. This further drove down the price of BPA power, as would-be purchasers knew that a large amount of "fish power" would come onto the market at very low prices. With the Intertie now increasingly open to all who would wheel because of the spirit of deregulation, the Intertie could be loaded with cheap "fish flush" electricity when it was most needed to run southwest airconditioners. BPA revenues from extra-regional sales plunged.⁸⁸ The California gold mine was gone.

4. **Assumption:** Private utilities would need new power sources. They would place substantial firm power load upon BPA, rather than acquiring their own resources, because it was cost effective. These sales would provide BPA revenues and help BPA meet its bottom line. This would also hold down the costs of the residential exchange program which benefited private utility customers and help pay for the large con-

84. Theoretically, BPA's transmission services could be a money maker even in a deregulated environment. However, the Transmission System Act of 1974 requires BPA to provide transmission services at cost, 16 U.S.C. § 839(g), (h) (1994), and the mega-NOPR's rules on comparability also could foreclose this opportunity to the extent they are applied to BPA.

85. See BPA BUSINESS PLAN FEIS, *supra* note 5. BPA has elected the "Market Driven BPA" as its proposed alternative and describes it as requiring that "BPA ... change its programs to try and achieve its mission while competing in the deregulated electric power market ... [becoming] ... a more active participant in the competitive market for power, transmission, and energy services." *Id.* at § 2.2. See also *id.* at §§ 2.2, 2.4.4.1–2 (discussing Transmission and the impact of the Energy Policy Act of 1992).

86. *Idaho Rivers United v. Bonneville Power Administration*, No. 95–70340 (9th Cir., April 25, 1995) (case dismissed). Petitioners, a coalition of environmental groups and Indian tribes, sued BPA alleging that BPA's agreement to release some utility and industrial customers from certain obligations under their power sales contracts would cause BPA to lose revenue and therefore result in less dollars being available to fund fish and wildlife. BPA granted these waivers, in part, because of a belief that it makes better business sense to use the carrot rather than the stick. That is, BPA wants to be the electric power supplier of

choice in the region, not a supplier by force. Petitioners, on the other hand, prefer to see BPA hold its customers' feet to the fire and strictly enforce all terms and conditions of its contracts.

The case was never briefed. Petitioners filed a motion to withdraw the suit, and the case was subsequently dismissed. Nevertheless, the lawsuit highlights the continuing controversy that surrounds different business strategies BPA may employ to maintain its financial health, as well as the delicate balance between BPA's role as a competitive business and BPA's role as an environmental steward and surrogate tax collector for environmental projects.

87. See BPA 1994 ANN. REP., *supra* note 4, at 19. "BPA raised wholesale power rates an average 15 percent to start fiscal year 1994 ... " *Id.* However, conditions which include a prolonged drought, river operations for fish, and slumping industry sales, to mention but three resulted in actual revenues that were \$117 million short of the projected revenues of \$2,313 million. BPA's financial condition is expected to improve in 1996. See BPA 1995 ANN. REP., *supra* note 4, at 21.

88. BPA 1994 ANN. REP., *supra* note 4, at 17. The extended drought conditions, fish operations, and a continuing California recession in a market where there is already surplus capacity were major factors in the decline of BPA extra-regional revenues from a \$196 million in 1991 to \$76 million in 1994.

servation programs and fish and wildlife efforts that were envisioned under the Northwest Power Act. Since the private utilities would be purchasing from BPA, they would also be effectively guided by the policy decisions of the Northwest Power Planning Council, thus bringing public, private, and industrial electric planning under one central planning forum for the entire Pacific Northwest.

Fact: The Northwest Power Act imposed no obligation on private utilities to purchase power from BPA, and when it became apparent shortly after the Act's passage that the Pacific Northwest had a power surplus instead of a power deficit, they chose not to do so. However, BPA was still required to offer residential exchange contracts to the investor owned utilities. This increased BPA costs by \$2,445,000,000 from 1980 to 1995 and effectively precluded the formation of any new public utilities who would be more likely to purchase from BPA. The private utilities could also attract new industry without the need to use BPA power, thereby avoiding the "new large single load" rate that their public utility counterparts were forced to charge if they had no resources of their own. Investor-owned utilities also took advantage of BPA conservation programs, and were additionally benefited during this time period. Finally, because the private utilities placed little load on BPA, they effectively were excused from compliance with the Northwest Power Council's Fish and Wildlife Program. These programs placed additional costs on BPA, making it less competitive with private utilities.

5. Assumption: Preference customers would continue to purchase approximately the same amount of power, if not more, from BPA than they had prior to the Act's passage. They would not acquire their own resources because BPA resource acquisition was more economical and less risky.

Fact: It is risky to make broad generalizations about BPA customers, especially preference customers. Some are large and enjoy significant economic power, while

others are small with little industrial or consumer base. Some own their own resources, but others are wholly dependent upon BPA.

Many of BPA's small, full requirements preference customers remain with BPA because they lack ready alternatives or remain faithful to the concept of public power as a sound policy. Partial requirements customers, and larger public agencies with economic power, are far less committed. Many maintained load on BPA only so long as it was in their economic interest to do so. Then, to take advantage of lower gas prices, they began to look for ways to leave BPA.

Because BPA was in deficit in 1994, public utility contracts arguably allowed some to leave on one year's notice, or reduce their BPA load.⁸⁹ Several were allowed to reduce load and others want to follow.⁹⁰ They are lured by BPA's competitors, many of whom are the very private utilities that BPA had envisioned as its regional partners when the Northwest Power Act was passed.⁹¹ In essence, they see a no-lose situation. They believe they can purchase from alternative suppliers today and, if prices rise, assert their statutory preference right to place load on BPA at any time. From their perspective, this is as close to "eating your cake and having it too" as you can come.

6. Assumption: The Bonneville Direct Service Industry customers would modernize their plants, and thus become a valuable net asset for BPA. Sales to the DSIs would help generate the revenues to pay for other programs.

Fact: While some DSIs modernized their plants, many others did not. The aluminum markets collapsed in the late 1980s and BPA adopted a "variable" rate which kept DSI electricity prices artificially low when metals markets were depressed. This maintained load that otherwise might have been lost, and it was a prudent business decision. The difficulty with the "variable" rate is that the ceiling was capped at a level which was proven unreasonably low when the DSIs began to prosper in better times.⁹² The DSI situation was further complicated

89. See § 7 of Contract No. DE-MS79-84BP, dated February 7, 1984, between BPA and "metered requirements" and "computer requirements" customers.

90. See BPA Surplus Deal with Clark Collapses; PUD Turns to IOUs.,

CLEARING UP: NORTHWEST ENERGY MARKETS, October 9, 1995, at 8.

91. *Id.*

92. See BPA 1994 ANN. REP., *supra* note 4, at 17.

because they, like other BPA customers, have sought alternative suppliers and reduced load on BPA.⁹³ The power sales contracts allow them to terminate BPA sales on one-year notice. To compensate, BPA has made concessions which many claim will cost BPA significant revenue.⁹⁴

7 Assumption: Since BPA is a self-funded agency, not subject to the vagaries of annual appropriations, it could easily raise enough money through its rates to fund a wide array of conservation programs which would otherwise not succeed because the cost of conservation was too great absent BPA financial support.

Fact: It is true that BPA is a self-funded agency and is not dependent upon annual appropriations. It is also true that the Northwest Power Act treats conservation as a resource, requiring BPA to acquire it first, and give it a 10% cost advantage. Since passage of the Northwest Power Act, BPA has acquired 580aMW of conservation. This has not been easy and until recently conservation has not paid its own way. That is now changing.

8. Assumption: The same ability to self-fund programs would also enable BPA to pay for a substantial fish and wildlife program to "protect, mitigate, and enhance" the Columbia River's fish and wildlife population. This would likely double the Columbia River fish runs, avoiding Endangered Species Act listings. Both Congressional and state legislatures would have pressure for fish and wildlife appropriations reduced because BPA rate payers would directly fund many of these efforts.

Fact: Since the Northwest Power Act became law, BPA has spent more than \$1.7 billion dollars on fish and wildlife.⁹⁵ Annual

costs now equal the WPPSS annual debt service payments. The Northwest Power Act encouraged and the Council's program relied on hatchery production to boost returns. This has been highly controversial. It has effectively been discredited by ESA listings of Snake River fish by the National Marine Fisheries Service, where hatcheries have been blamed for undermining genetic integrity of threatened and endangered fish. Runs of fish not only have not doubled, they have in many instances dramatically declined. This decline can be attributed to an ecosystem that has been radically altered by human intervention. This has occurred in part because of dam produced mortality, but also for other reasons, such as habitat degradation and excessive harvest. Warm ocean conditions producing an "El Niño" effect have also adversely impacted the salmon's food chain.⁹⁶

9. Assumption: Governors of Oregon, Washington, Idaho, and Montana would appoint a knowledgeable body of policy overseers to plan the electric power and fish and wildlife future of the region in a cooperative and effective manner. They would overlook the traditional urban-rural, socio-economic-political divisions that have led to the creation of what is often called "the Cascade Curtain." The Governors would be directly involved in this effort and develop internally consistent policies within their own states and on a regional level.

Fact: Many of the governor's appointees have been people of stature. The Council's first Chairman, former Governor and U.S. Senator Dan Evans, was able to gain broad political support for the Council. There is reason to doubt however, whether Council members' decisions are always well coordinated with other agen-

93. *Id.* The 1994 Annual Report notes the decline in DSI sales:

Normally, sales to aluminum smelters make up well over one-fourth of BPA's total revenues. In the past three years, however, aluminum share of BPA total revenues has fallen to 21.2 percent, to 18.1 percent, and to 17.8 percent in 1994. The decline is likely to continue as competition among suppliers increased.

Id. See also Effinger, *supra* note 40.

94. See the "BPA Power Sales Contract" with its industrial customers, dated August 25, 1981, especially § 2(b).

95. See BPA 1994 ANN. REP., *supra* note 4, at 23.

96. The primary cause of this decline is man's extraordinary arrogance and belief that nature can be manipulated without being destroyed. Salmon have been harvested to near extinction

since the turn of the century. See DONALDSON & CRAMER, *FISHWHEELS OF THE COLUMBIA* (1971). The carrying capability of the ocean has been severely reduced and important aspects of the salmon's foodchain nearly depleted. JIM LICHATOWICH, *OCEAN CARRYING CAPABILITY* (1993). Salmon habitat has been degraded, and marine mammal predation causes far greater mortality than ever envisioned. DON PARK, *EFFECTS OF MARINE MAMMALS ON COLUMBIA RIVER SALMON UNDER THE ESA* (1993). On top of all this, exists the Columbia and Snake River dams. The Council's goal of doubling salmon runs was necessarily doomed to failure, since the Council's Program can only influence impacts caused by the operators and regulators of the federal hydroelectric power system. 16 U.S.C. §839b(h)(11)(A)(i) (1994). The Council has no authority over the myriad of other critical factors contributing to the salmon's decline, either "in river" or in the ocean.

cies within their States. Council decisions in the power area are far less important with the Pacific Northwest in a surplus condition. This is because there are few resource acquisitions being undertaken which the Council can influence. Council decisions concerning anadromous fish have largely given way to the ESA process, and the Council program has increasingly followed rather than led regional fish and wildlife planning as Congress intended.

The Council has also begun to break down along traditional geo-political or "Cascade Curtain" lines. Idaho and Montana members are understandably concerned about protecting their water resources from "down river" urban interests that they sometimes see as favoring a few "wild salmon" over agriculture and "state's rights." They also question whether salmon are unreasonably favored over resident fish, such as sturgeon and bull trout, and whether other authorized hydroproject purposes such as recreation and navigation are sacrificed for the sake of salmon. "Downriver" urban interests in Washington and Oregon have sometimes viewed "upriver" agriculture as subsidized, wasteful, and provincial. These divergent views make finding common ground very difficult.

10. Assumption: The rock-solid financial base produced by the above arrangements would provide BPA a steady stream of dollars to repay its Treasury debt, pay for new and old customer benefits, and for other new entitlement programs the Act required, such as fish and wildlife and conservation.

Fact: BPA's financial condition is precarious. Sales revenue has decreased significantly, lawsuits have been filed by resource developers regarding BPA acquisition contracts, and rates cannot rise because to do so would further erode BPA competitiveness. BPA has used surpluses garnered from earlier refinancing of WPPSS debt to stay current in its Treasury payment, but outyear projections show that without additional cost-cutting efforts there exists a possibility of substantial deficits.⁹⁷

V. And the Answer Is?

The Northwest Power Act is broken. The assumptions upon which it is built were as fleeting as an east wind out of the Columbia Gorge. The question is whether and how to fix it? In the new, deregulated, and competitive era, do we dismantle Bonneville, or significantly redefine its role? Is the Bonneville Power Administration's survival important? If BPA's survival is important, are those who benefit willing to adjust their own level of benefits and entitlements to make this possible, or will they continue arguing that "what is mine is mine" and "we will negotiate about yours." And will they still be "hanging on" when they turn off the lights at BPA for the last time? As might be expected, there is no "silver bullet." If there was, it would have been found. Some of the more frequently discussed options, both realistic and otherwise, include the following.

A. Administrative Options: A Partial Answer?

1. *Defer Treasury Repayment*

Old solutions are unlikely to work. As BPA customers leave, and the cost of public benefits and entitlements rise, BPA's bottom line is in jeopardy. In earlier times, this was a prescription for a Treasury deferral. BPA would exercise its legal right to defer its annual repayment to the Treasury, and continue to push its 16 billion dollar debt⁹⁸ to future generations of ratepayers, secure in the fact that there would be someone there to pay the bill. Today, that is not a viable option, nor should it be. The Pacific Northwest's loss of powerful elected officials such as Senator Henry M. Jackson (D-WA) and his protégé Speaker of the House Tom Foley (D-WA), the pending retirement of Senator Mark Hatfield (R-OR), and the momentum toward deficit reduction, makes this option highly unlikely. Senator Hatfield's proposal to restructure the BPA's federal debt, discussed *infra*, is a positive alternative for today's changed environment.

2. *Raise Rates*

Similarly, raising rates in a deregulated market already suffering from an excess of supply to demand and depressed prices makes little sense. This only exacerbates BPA's situation by driving more customers to alternative suppliers, leaving those who remain with an obligation to pay for all of BPA's costs. Since under current law rates must be established to recover costs, this invariably leads to more rate increases, overly optimistic revenue forecasts, or both.

97. See BPA 1995 ANN. REP., *supra* note 4, at 23-26.

98. *Id.*

The "raise the rates" scenario is a prescription for the utility industry disease known as the "death spiral." "Death" ensues when the fewer and fewer remaining customers are saddled with the full magnitude of a debt that was formerly borne by many. This leads in turn to even higher rate increases to recover costs, which leads in turn to fewer customers who can afford to pay those higher costs. The prognosis is terminal.

The "rely on an overly optimistic revenue forecast" strategy has equally disastrous results, and leads over time to the same result as reality eventually catches up with fiction. By understating the need for rate increases, and holding down rates through reconfiguring key revenue and expense forecasts, rate increases are effectively reduced or postponed. The underlying problem, however, may not be solved. As a result, later generations of ratepayers may pay higher bills. In both cases, BPA loses revenues and customers over time.

3. Downsize and Sell Assets

A third option is to downsize and, if necessary, sell assets. This, it is argued, is what other businesses do under similar circumstances. To date, BPA will cut expenses by \$600 million per year from 1996–2002 and will reduce staffing levels by 1000 by 1996.⁹⁹ Further cuts are likely.

Asset sales remain an option. Most frequently discussed is the proposal that BPA sell its transmission system, including the Pacific Northwest–Southwest Intertie and the maingrid transmission network for the Pacific Northwest.

Selling the transmission system is an argument made in the name of competition and deregulation. Bonneville, it is urged, should be a leader in the utility industry and would be viewed as such by taking this bold action. Together with others, a giant west coast "Transco" could then be formed which could lower costs for all users and bring about additional efficiencies by providing open access to everyone who seeks to use it.

Not surprisingly, some of BPA's largest private utility competitors and industries are strong supporters of this option. For these groups, BPA remains a significant competitor, especially in the transmission arena where it controls more than 80 percent of the maingrid and the Pacific

Northwest–Pacific Southwest Intertie. There is concern that BPA could utilize what some perceive as market power to set rates which recover more than actual costs. This is in contrast to the current practice where BPA rates recover only actual costs for transmission. The thought that BPA would increase transmission rates to raise revenue to pay for a wide variety of costs, such as fish and wildlife, is troubling to those who must rely on BPA for wheeling services. Such a move is also at variance with the direction taken by the Federal Energy Regulatory Commission (FERC) in its mega-NCPR policy to provide equal access to transmission to all users.

Companies undergoing competitive challenge, however, rarely sell their best asset and there is little reason for competitors to want to purchase transmission access if it is provided consistent with the FERC mega-NOPR's guidance. Sale of the transmission system would be a prescription for liquidation, not reorganization. Selling BPA's transmission system makes sense only if, as some Congressmen suggest, BPA is to be sold.¹⁰⁰ Absent such a sale, for BPA to sell its transmission system or otherwise merge it into a regional "Transco," would only exacerbate an already very difficult situation which is being addressed by creation of an independent transmission business line within BPA.¹⁰¹ Sale of the transmission system would also leave BPA with the same public benefits and entitlements but fewer means to pay for them. The BPA resource base would consist of a relatively high cost thermal resource, WPPSS nuclear plant number 2, and the output of the federal hydroelectric projects, the operations of which are increasingly driven by fish recovery instead of power production. This could further exacerbate the "customer flight" which BPA is currently addressing.

One de facto liquidation option would be for WPPSS to become competitive by reducing costs, or close. The federal dams could be operated primarily for fish and wildlife needs, irrigation, navigation, and recreation. The power that remains after non-power priorities are met would be sold at auction to the highest bidder at the bus bar. Shaping and scheduling services could be provided by someone other than BPA. BPA's continued existence is not necessary for this alternative. Just such an option was proposed by the Idaho Power Company

99. See NORTHWEST POWER PLANNING COUNCIL, *SUPRA* note 6.

100. See Benjamin Holden, *Three Federal Utilities May Be Sold By Year's End Under Bipartisan Plan*, WALL ST. J., Sept. 11, 1995, at 3 (quoting Congressman Doolittle (R-CA), Chairman of the House Water and Power Subcommittee, as saying that he "expects that the federal government will have disposed of BPA and other power marketing agencies within five years").

101. Other alternatives to assure fair access and coordination

among federal and non-federal transmission owners abound. One option would be to negotiate a "Pacific Northwest Transmission Agreement"—a transmission plan that would parallel the already existing "Pacific Northwest Coordination Agreement" which serves to coordinate federal and non-federal hydroelectric operations. Another option would be to legislatively spin-off BPA's transmission system and create a new federal agency which would then coordinate all transmission, both federal and non-federal.

on December 6, 1995, in testimony before the Subcommittee on Energy and Power House.¹⁰²

But BPA's demise would not be without significant costs. Perhaps most importantly, the concept of BPA as the utility which can encourage competition through a "yardstick" rate to keep other electric suppliers' prices as low as possible consistent with sound business principles would be lost. In the end, with the removal of the largest utility from the landscape, and the resultant loss of competition, the end use consumer would lose. The social benefits BPA provides through funding for fish and wildlife and conservation would also disappear. If Bonneville does not fund these public benefits, Congress or the states would need to appropriate the billions of dollars of funds for these activities. That is not likely to happen. Nor would BPA's fixed debt to the Treasury disappear. Because BPA's liabilities far exceed its assets, some significant portion of the \$16 billion Treasury debt would likely be required to be absorbed by the U.S. taxpayer. No rational purchaser would pay such a price for an asset, nor is there reason to believe that the Administration would accept a reduced price.

4. Assert Contract and Other Rights

Environmental groups and some public utilities argue that BPA should assert its contract rights and, wherever possible, insist that its customers continue to purchase large blocks of power from BPA. Two measures are suggested: reductions in residential exchange payments made to large, primarily investor owned utilities, and the imposition of "stranded investment" costs to require those customers that do leave to pay for their fair share of BPA's sunk costs associated with nuclear projects, fish and wildlife, and other programs. These sunk costs have been undertaken in reliance on those customers continuing to buy power from BPA. Both issues are spawning significant political debate and legislative action. In the end, they may be resolved by the courts.

The residential exchange was captured in section 7(b) of the Northwest Power Act. It assured, through a complex methodology, that residential and farm consumers would pay rates roughly equiv-

alent to those paid by comparable public utility consumers.¹⁰³ It was intended to create rate parity between residential customers of public and private utilities. The Act requires BPA to enter into agreements with exchanging utilities to exchange their higher priced power for BPA's lower cost power, with BPA paying the difference. The protection for public utilities was that their customers would never be worse off than they would have been in the absence of the exchange arrangement.

However, as previously discussed, the assumptions of the Northwest Power Act have proven largely erroneous. One such assumption was that BPA customers would continue to enjoy low-cost power. In fact, BPA costs have risen and exchanging utility costs have declined. As a result, BPA proposed to reduce the exchange subsidy from \$200 million per year to \$75 million.¹⁰⁴ The reason: rate parity can now exist in the absence of a subsidy, or with a substantially reduced subsidy. The issue is currently pending in BPA's rate case, where it will be driven by recent congressional action fixing the level of the exchange benefits at \$145 million for Fiscal Year 1997.¹⁰⁵ A similar "cost-recovery" issue is raised through the "stranded investment" debate precipitated at the national level by the Federal Energy Regulatory Commission's outstanding Notice of Proposed Rulemaking (NOPR).¹⁰⁶ The question is whether a utility which loses customers to alternative suppliers can charge those customers exit fees or a similar charge to recoup costs incurred for resources that were acquired to serve those customers in the long term. Here, many utility customers and industries find common ground. They all want the right to leave without paying for costs which BPA has incurred in the expectation of continuing to serve them. BPA's nuclear plant costs are the most frequently discussed, although fish and wildlife costs are also at stake. Environmentalists, on the other hand, and some of BPA's public utility customers, see BPA giving up a valuable right. BPA has recently signed contracts with certain aluminum companies which arguably relieve them of the obligation to pay "stranded investment costs." The contracts assume that if enough load remains with BPA, recovery of such costs will be unnecessary. Those contracts are

102. A variant of this option was recently suggested by Mr. Brett Wilcox, the owner of Northwest Aluminum Company. Thoughts on Restructuring the Northwest Electric Power Industry (a paper presented to the Governors Review Committee on February 14, 1996).

103. See H.R. REP. NO. 976, *supra* note 26, at 34. As noted earlier, residential exchange subsidiary costs to date have totaled \$2,445,224. Conversations with BPA Residential Exchange Staff, Portland, Oregon. This includes \$194,352,693 for fiscal year 1995, and by statute, \$145 million for fiscal year 1990. See *infra* note 113.

104. See BONNEVILLE POWER ADMINISTRATION, DOE/BP-2607, 1996 INITIAL RATE PROPOSAL (1995).

105. See Act of January 4, 1995, Pub. L. No. 104-46, Title V, § 508(e) (1995). See also NORTHWEST POWER PLANNING COUNCIL, *supra* note 6, at 13-15 (discussing the residential exchange issue).

106. See Federal Energy Regulatory Commission, Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Supplemental Notice of Proposed Rulemaking, 70 FERC 61,357 (March 29, 1995) (the Commission's mega-NOPR). See also NORTHWEST POWER PLANNING COUNCIL, *supra* note 6, at 16-17.

highly controversial. Not surprisingly, other BPA customers are now seeking similar protections.¹⁰⁷

B. Legislative Change

While it lasted, the Northwest Power Act was a movable feast. The parties who signed onto this complex, highly technical statute got the benefit of their bargain. For sixteen years, they have enjoyed a wonderful land of never ending benefits and entitlements. Their mistake was in assuming that the party could go on forever.

Deregulation, the California recession, the collapse of the electricity commodity market caused by plunging natural gas prices, and a new found political antipathy to deficit spending has brought the Bonneville Power Administration, and those who benefitted from its existence face to face with reality. The sixteen-year party is over.

This brings us to the present. BPA's utility customers, states, Indian tribes, other federal agencies and those who benefit from BPA's continued existence must look themselves in the mirror. BPA is struggling financially, seeking to adjust to a new, competitive environment while recognizing that it must act more like a business than a government agency. To survive, fundamental legislative change is essential. The change will not be easy, however. BPA's competitors would frequently prefer that it go out of business, while many of its remaining customers are increasingly indifferent as they survey the options presented by a deregulated utility industry.

The need for change is the subject of an intense ongoing "regional review" in 1996. The Department of Energy and the Bonneville Power Administration called for such a review on September 28, 1995. They urged that its scope be broad and include a "re-examination of the ... Northwest Power Act of 1980" and all other "organic BPA statutes, including the Bonneville Project Act of 1937, the Flood Control Act of 1944, the ... Regional Preference Act ... and

the ... Transmission System Act."¹⁰⁸ The "regional review" is also endorsed by the Conference Report of the Appropriations Committee for Energy and Water Development for Fiscal Year 1996.¹⁰⁹ The Report notes that "there is a nearly unanimous call from affected parties—user groups and ratepayers—to start the review of the Northwest Power Act."¹¹⁰ The Pacific Northwest governors kicked off the review on January 4, 1996, with a commitment to "have an adequate, efficient, economical, and reliable power system despite the restructuring of the industry."¹¹¹

1. Interim Solutions

On an interim basis, some statutory changes have already been made, and others are forthcoming. They include an attempt to address fish and wildlife funding, regional preference, the residential exchange, and debt refinancing.

a. The Saga of the Energy and Water Appropriations Act for 1996

The first significant steps to recovering BPA's financial health were taken in the Energy and Water Development Appropriations Act for 1996. Initially seen as a legislative vehicle to provide stable, long term funding for fish and wildlife, the bill ran into heavy sledding when Senator Hatfield sought "sufficiency" language to assure by statute that the more than 4 billion dollars BPA proposed to spend would satisfy its environmental responsibilities.¹¹²

The legislation that emerged, which was enacted without fiscal year limitation, would cause a reasonable person to ask, "where's the beef?" or, in this case, "where's the fish?" While the legislation significantly amends regional preference, fixes the level of residential exchange benefits for fiscal year 1997, provides procurement and personnel flexibility, and obliquely addresses the need for greater regional control of fish and wildlife issues, fish financing and environmental sufficiency are not statutorily addressed.¹¹³

107. See *Idaho Rivers United v. Bonneville Power Administration*, No. 95-70340 (9th Cir., April 25, 1995) (case dismissed), *supra* note 86.

108. DOE Press Release, *supra* note 9, at 1-2.

109. See H.R. CONF. REP. NO. 293, *supra* note 76.

110. See *id.* at 93. The conferees "urge a renewed review ... within the authorizing committees in the next session of Congress to answer these important issues, [fish and wildlife costs and their control], and other important issues confronting the region." *Id.* at 94. It is likely that this review will not be completed until after the 1996 elections.

111. See Governors' Letter of December 14, 1995.

112. The politics of "sufficiency" language proved impossible because of the significant criticism that the Clinton Administration encountered when it agreed to very broad sufficiency language in the timber salvage law.

113. See the report of the Committee on Conference making Appropriations for Energy and Water Development for Fiscal Year

1996. H.R. CONF. REP. NO. 293, *supra* note 76, at 10-11, 74, 93-95. The legislation, sponsored by Senator Hatfield and adopted without respect to fiscal year limitation, is a one part of a two-part arrangement to help assure fish and wildlife funding and allow BPA greater marketing flexibility.

H.R. 1905, the Energy and Water Development Appropriations Act for 1996, is the first of what will likely be several bills introduced to address BPA issues. It addresses but does not conclusively dispose of three subsidies, residential exchange benefits, fish and wildlife costs, and regional preference. Fish and wildlife costs were constrained through an administrative agreement, and residential exchange benefits were set at \$145 million for fiscal year 1997, substantially above what had been anticipated in the initial BPA rate proposal. Regional preference amendments were added to allow greater marketing flexibility. The importance of H.R. 1905, however, lies in the fact that it signals Congress's willingness to engage these difficult issues. As noted in conference, "[t]he conferees...urge a renewed review of the Northwest Power Act to answer these and other important issues confronting the region." *Id.* at 93.

Section 508(3) of the law allows BPA to sell what is defined as "excess power" on a firm basis for seven years without respect to the recall provisions of the Northwest Power Act, or the resale provisions of the Bonneville Project Act. "Excess power" is that class of power which is created by customers leaving BPA for other suppliers and by operations of the federal Columbia River power system undertaken primarily for the benefit of fish and wildlife. BPA is to prepare a report for Congress concerning how it will implement "the sale of excess federal power" provisions within 90 days.¹¹⁴

Section 508(e) addresses residential exchange issues. It calls for a \$145 million payment to exchanging utilities for fiscal year 1997, together with report language directing that "to the extent practicable...such actions as are necessary to assure that the proposed rate for public utilities and direct service industries are not increased from the initial proposal."¹¹⁵ This guidance would seem particularly difficult to achieve without increasing the risk of a Treasury shortfall because there are no other "pockets" from which to collect revenues. BPA's challenge will be to meet this directive and also adhere to the admonition of the Conference Committee which stated that "[r]ecent actions by [BPA] have led to concerns that [BPA] may not make its Treasury payment in fiscal year 1996" and added that "failure by [BPA] to make the full annual payment to Treasury will seriously jeopardize its credibility with Congress and will lead to more involvement by Congress."¹¹⁶

While assuring Treasury payment is a laudable and correct goal, it is not one that is furthered by directing BPA to increase the size of the residential exchange while also limiting its ability to collect the shortfall from others. Regrettably, in a deregulated environment, the banker or, in BPA's case the Treasury, can expect shortfalls. The question is not whether such shortfalls will occur, but how to make the Treasury "whole" in the event that the competitive market environment leads to this unfortunate circumstance.

Section 508(c), while procedural in nature, is important because it signals Congress' increasing frustration with federal fish and wildlife agencies

involvement in what many view as a Northwest resources issue. The Power Council is directed "within 180 days ... to report to Congress regarding the most appropriate governance structure to allow more effective regional control over efforts to conserve and enhance anadromous and resident fish and wildlife" within the Columbia River system.

The conferees were also concerned that increasing BPA fish and wildlife costs not result in a "shifting of costs—both directly and indirectly—to the nation's taxpayers and to non-federal interests on the Columbia and Snake River system" including "the region's electric ratepayers, agriculture, non-federal hydroelectric project owners, river users, reservoir users, water interests, and others."¹¹⁷ This presents interesting questions of fairness. Funding for the Endangered Species Act activities of most federal agencies is appropriated, and therefore spread across all of the nation's taxpayers. If normal rules applied, therefore, approximately \$200 million per year of BPA's fish and wildlife costs would be paid for by the "nation's taxpayers." However, because BPA uses the Bonneville Fund to pay fish and wildlife costs, normal rules do not apply, and BPA rate-payers pay the entire bill.¹¹⁸

Finally, section 508(d) gives the Corps of Engineers procurement flexibility by enabling it to use BPA's authorities for FCRPS power generation and fish and wildlife operations, and BPA is authorized by section 508(f) to offer separation incentives of up to \$25,000 to further reduce employment.

The fish and wildlife funding issues that were intended to be addressed in the Energy and Water Appropriations bill are instead addressed separately in an Administration agreement with Congress. The agreement, memorialized in an October 29, 1995 letter from Budget Director Alice Rivlin to Senate Appropriations Committee Chairman Mark Hatfield approved a ten-year funding level of \$252 million for the ESA biological opinions and the Council Fish and Wildlife Program, plus whatever costs are associated with needed hydro-power operations. It also created a "Fish Cost Contingency Fund" from which BPA can draw section 4h10(C) credits already owed its ratepayers to help assure Treasury repayment.¹¹⁹

114. *Id.* at 95.

115. *Id.*

116. *Id.* at 74.

117. *Id.* at 93.

118. See 16 U.S.C. §§ 838i(b)(12), 839b(h)(10)(A), (B) (1994). This anomaly is left to a later Congress to address.

119. Letter from Alice Rivlin, Director, Department of Office and Management, to Senator Mark Hatfield (R-OR.), Chairman, Committee on Appropriations, United States Congress (Oct. 24, 1995) (establishing the "fish contingency

fund). The letter references and builds upon Director Rivlin's March 15, 1995 testimony before the Subcommittee on Energy and Water of the Senate Appropriations Committee. The approximately \$325 million in the "fish contingency fund" comes from BPA ratepayers who have overpaid their fish and wildlife bill for the past 15 years because of a statutory obligation to pay from the Bonneville fund for all fish and wildlife costs "on a system wide basis." Such payments are, in fact, more than is owed by BPA because BPA is only to pay for the hydropower share of the projects, which averages about 73% of total project costs. The other 27% is the responsibility of other project purposes, and not ratepayers. The law contemplated a

b. Debt Refinancing

Senate Bill 92, the Bonneville Power Administration Appropriations Refinancing Act, has become law. It is part of the Omnibus Fiscal Year 1996 Appropriations Act signed by President Clinton on April 25, 1996. It was co-sponsored by Senators Mark Hatfield (R-OR) and Patty Murray (D-WA) and had Administration support.¹²⁰ The law restructures BPA's outstanding Treasury debt. This is accomplished by resetting the outstanding principal at the present value of the principal and annual interest that BPA would pay in the absence of the Act, plus \$100 million.

BPA's debt and the relatively low interest rates that are charged for projects such as the Bonneville dam are constantly criticized as government subsidies for ratepayers who already enjoy some of the lowest utility rates in the nation. The new law is designed to end that debate and criticism. The BPA and its customers will get certainty from this law, which precludes any administrative refixing of BPA's low interest debt at current market rates. The federal taxpayers are paid a bonus of \$100 million for giving up any arguable right to undertake such an administrative refixing. The new interest rates are based on the Treasury Department's prevailing yield curve, with future capital investments based on Treasury market rates at the time when the investments are placed in service. Expected benefits in reduced net federal outlays are \$45 million over the period fiscal year 1996 through fiscal year 1998.¹²¹

2. Longer Term: Statutory Change that Pulls the Straws Out of the Punchbowl

While the interim steps taken by the Energy and Water Appropriations Act and the debt refinancing law are positive for the near term, a longer term solution is needed if BPA is to survive. That solution must address the fact that BPA is saddled

with the Northwest Power Act that assumed a utility world that is now surely as extinct as the dinosaur.

Finding a solution, and then gathering the political will to adopt it into law, will be a Herculean task. Some of BPA's customers are now its competitors, and those who remain are increasingly unwilling to expend the political capital to help BPA survive when there is a cheaper supplier readily available. Environmental activists and Indian Tribes should support a BPA solution that works. Conservation, fish and wildlife, and other socially desirable projects paid for by BPA ratepayers are unlikely to be funded at anywhere near current levels by state legislatures or Congress. But they do not approve of BPA either: they argue that BPA should "hold onto its current customers," terminate the remaining WPPSS nuclear plant, and increase their share of the financial pie. What many seem incapable of realizing or accepting is that the pie could disappear.¹²²

The punch bowl metaphor is one that is frequently used by BPA's customers and public interest groups. Those who benefit from the public benefits and entitlements hold the straws and do the sucking. BPA is the keeper of the punch bowl and the punch. The problem is simple: too many straws and not enough punch. The issue is fundamental to BPA's long term survival and can only be corrected by significant change to BPA's organic statutes.

Legislation is the art of the possible. However, it is unrealistic to expect we can pay for socially desirable programs such as fish and wildlife and conservation, and maintain relatively low power rates and quality transmission facilities, unless there is a political recognition of the need to agree to a "benefits giveback" program. All who benefit must sacrifice something if Bonneville is to remain

"true up" at Treasury which in fact never occurred. The Rivlin-Hatfield agreement is important because the Administration acknowledges the debt and establishes a specific fund and a means by which BPA ratepayers can reclaim what is rightly owed to them. See Memorandum from Harvard P. Spigal, General Counsel, Bonneville Power Administration, to Randall Hardy, Administrator and Chief Executive Officer, Department of Energy, interpreting § 4(h)(10)(c) of the Northwest Power Act (June 6, 1994).

120. Senators Mark Hatfield (R-OR) and Patty Murray (D-WA) introduced the bill on January 4, 1995. See 141 CONG. REC. S50 (daily ed. Jan. 4, 1995).

121. See *Hearings on S. 92 Before the Subcomm. on Energy Production and Regulation of the Senate Comm. on Energy and Natural Resources*, 104th Cong., 1st Sess. 3 (1995) (statement of Jack Robertson, Deputy Administrator Bonneville Power Administration).

122. Environmental groups are understandably torn. They face a statutory game of "fish funding jeopardy." Behind "door number one" is something of tremendous value: BPA's self-funded status. It is valuable because it avoids testing Columbia River fish and wildlife needs against other priorities; a balancing that normally occurs through the appropriations process. These same needs may exceed BPA's ability to pay. And BPA's financial condition is precarious. This leads to "door number two" the risk of failure to "lock in" now on some certain level of funding, may mean there is even less funding in the future if BPA's customers continue to seek other suppliers. Maybe everyone is better off with something relatively certain than something so uncertain. Certainty regarding BPA's financial future on what some view as discretionary fish and wildlife funding is critical if BPA is to retain existing customers and find new ones. And if existing customers leave, or new ones fail to materialize, both BPA and the fish and wildlife interests are harmed.

viable.¹²³ The alternative, particularly if the Republican party retains congressional control and wins the Presidency in 1996, may be BPA's sale or dismantlement.¹²⁴ While the latter may be lauded or lamented as a matter of policy, it will bring about fundamental change in a Pacific Northwest economy which has planned and operated its electric system as if there were but "one utility" with BPA as the largest of the lot.

What follows are suggestions as to how BPA could be reshaped. The key is not any one proposal but a statutory framework that allows the flexibility to adjust to changing times, and correct perceived excesses through the political process. We are arrogant and presumptuous if we believe we are sufficiently visionary to write a new law that will correctly predict the future. Events can and will change, and the "statutory contract" model of the Northwest Power Act should be discarded. The "regional review process" on which the Pacific Northwest is embarking will be painful enough without the need to "do it all over again" in ten years.

a. Government Corporation

Government Corporation legislation is not a solution in itself; it is a framework for a solution. BPA's ability to function as a business has been hampered since its inception by the rules, regulations, and procedures that bureaucracy imposes on more traditional regulatory agencies. A series of legislative changes have sought to correct this situation, with only partial success.

The first and only amendment to the Bonneville Project Act was offered expressly for the purpose of freeing the Administrator from these sorts of requirements.¹²⁵ Then Congressman Henry "Scoop" Jackson (D-WA) observed that "[t]he Bonneville Power Administration is not carrying out a governmental regulatory program. It is engaged in a large-scale business enterprise, ... the third largest distributor of power in the United States."¹²⁶

123. Sacrifice is not a word which comes easily to the beneficiaries of BPA's largess, and the task is made far more complicated because of deregulation. Utilities and industries now have the ability to "play the market." They can purchase power from suppliers other than BPA, and then ask BPA to wheel it to them at cost. 16 U.S.C. § 838(g), (h) (1994). By such practice they hope to avoid the type of stranded costs discussed in the FERC mega-NOPR. See 70 FERC 61,357, *supra* note 106. Needless to say, they are reluctant to willingly give up such a benefit.

The "deregulation issue" spills over into the world of politics. In the case of the timber industry, many Northwest logging companies have no alternative supplier to Forest Service lands and therefore fight tenaciously for a solution that lets them stay in business. BPA customers, especially preference customers, fight far less tenaciously. They can and are purchasing power

This was a battle that was to occupy "Scoop" Jackson throughout his entire forty-three-year career. As Chairman of the Senate Energy Committee, he was the primary sponsor of the Federal Columbia River Transmission System Act of 1974¹²⁷ (FCRTSA). The FCRTSA created the Bonneville Fund as a separate fund within the Treasury from which expenditures could be made without further appropriation by Congress. It also provided for submission of a budget under the Government Corporation Act. In 1985, the Bonneville Fund was exempted from sequestration under the Graham-Rudman Act.¹²⁸

Since his death, Senator Jackson's long-time overseer role of the BPA has been assumed by his friend and colleague, Senator Mark Hatfield (R-OR). Recognizing that additional change was needed, Senator Hatfield and Congressman Peter DeFazio (D-OR) supported a June 1993 contract with the National Academy of Public Administration (NAPA). The purpose of the contract was to examine measures that would increase BPA's efficiency and effectiveness without changing its substantive statutory obligations. NAPA's report recommended Government Corporation status for Bonneville. It noted that BPA possesses attributes that are common to other primarily business entities like the U.S. Post Office: business oriented; self-sustaining; and involving substantial business transactions with the public.

While yet to be introduced in Congress, a draft proposal for comprehensive government corporation legislation has been reviewed within the region, and is circulating within the Administration. Several information hearings have been held, the most recent in June 1995 before the Subcommittee on Government Management, Information, and Technology before the House Committee on Government Reform and Oversight. The legislation, as envisioned by BPA's Deputy Administrator Jack Robertson, would cre-

elsewhere. As a consequence, they appear at times far less interested in finding a solution to BPA's difficulties than they did in 1980 when BPA was, with few exceptions, their sole supplier.

124. See Holden, *supra* note 100, at 3.

125. Act of October 23, 59 Stat. 546 ch. 433, § 1 (as amended by 16 U.S.C. § 832a(f) (1994)).

126. Hearings on H.R. 2690 and H.R. 2693 Before the House Committee on Rivers and Harbors, 79th Cong., 1st Sess. (June 20, 1945).

127. 16 U.S.C. § 838(a)-(k) (1994).

128. See Balanced Budget and Emergency Deficit Control Act (Graham-Rudman), § 905(g)(1) (codified at 16 U.S.C. § 838(k) (1994)).

ate BPA as a government corporation under the Government Corporation Act. Potential savings would reach \$30 million per year.¹²⁹ The savings would come from personnel, procurement, and other procedures which hamper the decisionmaking required by a competitive utility. For example, while the Transmission System Act allows BPA to directly fund its programs, and sell revenue bonds to the Treasury to finance capital investments, BPA is still subject to General Accounting Office rules that apply to appropriated agencies.¹³⁰ Similarly, Bonneville is restrained by civil service rules. It is prohibited, by way of illustration, from hiring temporary employees when needed, or from directly hiring other critical skill positions for operation of a utility. Similar red tape exists in the realty and procurement arena. Little is done quickly and what is done frequently costs BPA more than its competitors would pay for comparable service.

For a government corporation to succeed, it is prudent to place upon its board of directors a cadre of knowledgeable business executives, representatives of public interest groups, and state representatives. Other institutions, absent needed statutory reform, could be sunsetted as their function of state guidance over BPA activities would be efficiently served through a significant presence on a BPA board of directors.

b. Rates Issues

1. "Market Based Rates" for the Sale of Power

For BPA to be competitive in a deregulated utility world, it is critical that it be allowed broad flexibility to charge "market based rates." The directive to set rates "as low as possible consistent with sound business principles" is fine as far as it goes, and works well over the long term. The rub lies in demonstrating that those rates assure that during the relatively short term rate period BPA will recover all of its costs. The fact is that in a highly volatile, deregulated and competitive environment there are times when that simply will not happen.

Statutory change should be made to allow power rates to fully reflect market conditions. The Treasury should share in the profits. A more normal banker-business relationship should replace the political posturing that too frequently surrounds the Treasury repayment issue.

ii. Rate Benefits: Residential Exchange, Irrigation and More

Bonneville also financially supports what were once thought to be "higher cost utilities" through the residential exchange. The need for the exchange, as discussed above, is one of the key erroneous assumptions of the Northwest Power Act. While the residential exchange is fixed at \$145 million for fiscal year 1997, it is in fact time for it to end. If competition is the new order of the day, such benefits are no more supportable than the outdated preference and priority right of public power. Likewise, the irrigation benefits that BPA pays directly through the obligation to provide the Bureau of Reclamation with low-cost power for huge pumping operations at Banks Lake near Grand Coulee Dam should be repealed. Finally, let us not forget two other impediments to a truly level playing field: the low density discount rate provisions that are established to benefit rural area power service, and the "indigenous raw materials" provision included by Congressman Weaver to help the Hanna Nickel Company.¹³¹

iii. Rate Procedures

As earlier noted, the Northwest Power Act requires BPA to engage in complicated, lengthy, and adversarial rate procedures. The rationale for these rate procedures has ceased to exist. BPA is no longer the single wholesale supplier of electricity and electricity, in a deregulated era, has become a commodity. As noted by former BPA Administrator Charles Luce: "If electricity is to be available to all from many sources at 'market prices' there should be little need for elaborate and lengthy rate proceedings to protect utility and industrial customers. Competition, 'the invisible hand,' should do most of the regulating."¹³²

Alternatively, even if the rate procedures are left in place, there will be far less interest in BPA rate cases if the benefits and entitlements that are built into BPA's statutes are significantly reduced or eliminated. Quite simply, there will not be as much left about which to fight. In the interim, the multi-month BPA 1996 rate case continues. Attorneys and experts for BPA, its customers, and public interest groups continue to support or challenge the rates, as their financial interests are best served, while keeping one eye fixed on the ongoing "Regional Review" and other initiatives such as that begun by Senator Slade Gorton (R-WA) to reexamine BPA's underlying statutes and authorities.

129. See *Hearing on S. 92 Before the Subcomm. on Energy Production and Regulation of the Senate Comm. on Energy and Natural Resources*, 104th Cong., 1st Sess. 7 (1995) (statement of Jack Roberson, Deputy Administrator, Bonneville Power Administration).

130. *Id.* at 8-9.

131. 16 U.S.C. § 839e(d)(1)(2) (1994).

132. Speech by former BPA Administrator Charles Luce, December 7, 1995, "Re-examining BPA's Policies in a Competitive Environment."

c. Preference Provisions

Longstanding preference provisions are ripe for a "give back," having long ago served their purpose of enabling public utilities and cooperatives to get into the utility business. There are several preference provisions that obligate Bonneville to give priority to certain classes of customers: public preference for all publicly owned utilities and cooperatives,¹³³ regional preference for all Pacific Northwest electricity users,¹³⁴ Montana preference for Montanans from the Hungry Horse dam in their state,¹³⁵ and low density discount rate benefits for sparsely populated areas.¹³⁶ The arguments for modification, if not outright repeal, are eminently reasonable although politically charged.

Preference was included in the original Bonneville Project Act and subsequent laws on the assumption that public agencies needed a government priority to get into business, and that the Pacific Northwest needed protection from California utilities. They worked. Now, in many cases, the public agencies are every bit as large and powerful as their private counterparts, and the deregulation of the electric industry has brought about a west coast energy market which knows no artificial geographic preference.

There is an additional complicating factor emerging from the new paradigm of competitiveness. Many of BPA's existing customers are selecting private utilities or energy brokers as their preferred providers instead of BPA. They should be free to do so. While this may be a rational economic policy choice for those utilities, it cuts the ground from under any credible argument that preference still has real meaning.

Regrettably, however, the law as now written arguably provides those same public utilities who would abandon BPA, the right to later call on BPA to provide preference service at BPA's lowest rate if the economics of a BPA purchase again become attractive, and if BPA has not otherwise sold all of its remaining power on a long-term, non-recallable basis to others. This is fundamentally unfair to BPA and its remaining customers. It stands on its head the implied covenant between BPA and the public utility community: that BPA will provide power services and that public power will rely on BPA as their provider of choice. Bonneville and those who continue to rely on it, including those outside the

Pacific Northwest, should have the discretion but not the obligation to serve customers who elect to rely on the free market. Preference laws that would require BPA to take such northwest customers back should be changed to provide public bodies a right of first refusal to purchase BPA power which, if not exercised, would be lost. Failure to make comparable changes in regional preference will also limit BPA's ability to sign long term power sales and exchange agreements with California and other southwest customers. These agreements, if they can be struck, can be good for BPA's bottomline and good for the environment. Such sales frequently displace more expensive thermal generation which causes air quality problems.

d. New Large Single Loads

If competition is the new order of the day, the "new large single load provisions" (NLSL) of the Northwest Power Act should also be repealed.¹³⁷ The provisions define "new large single load" as "any load associated with a new facility, an existing facility, or an expansion of an existing facility" that is not "contracted for or committed to" a public or private utility or federal agency by September 1, 1979 and "which will result in an increase in power requirements of ten average megawatts or more in any consecutive twelve-month period."¹³⁸

Legal careers have been made and logic sorely tested in interpreting this inherently anti-competitive "new large single load provision." Any load considered a new large single load is denied access to the low-cost federal base system resources which are provided to public agencies and their loads which were already served when the Act became law.¹³⁹ Such loads are served with BPA power at rates based on BPA's other, usually more expensive, resources.

These "new large single load" provisions represent the worst in a coalition of public and private utility interests. Their purpose is to (1) hinder the formation of new public utilities, (2) deter existing industry that uses more than 10 average megawatts from leaving its current service area, and (3) discourage large new industry from moving to the Northwest. The assumptions that underlie its enactment have proven wrong. They included, first, that since all utilities would buy power from BPA, they would be applied equally. In fact, since private utilities and large public generators have bought very lit-

133. Northwest Power Act, 16 U.S.C. § 839c(a), g(c) (1994) (affirming the preference and priority provisions of the Bonneville Project Act, 16 U.S.C. § 832a(f) (1994)).

134. Pacific Northwest Preference Act, 16 U.S.C. § 837h (1994); Northwest Power Act, 16 U.S.C. § 839f(c) (1994).

135. 16 U.S.C. § 839g(f) (1994).

136. 16 U.S.C. § 839e(d)(1) (1994).

137. 16 U.S.C. §§ 839a(13), e(f) (1994); H.R. REP. NO. 976, *supra* note 26, at 51-53.

138. 16 U.S.C. § 839a(13)(A), (B) (1994).

139. 16 U.S.C. § 839(e)(f) (1994).

tle power from BPA, or can readily find alternative supplies, the "NLSL" provisions have disproportionately disadvantaged smaller utilities that take all of their power from BPA in their ability to site new industry. This has, on occasion, given rise to creative opinions regarding whether a load was in fact "contracted for or committed to" and equally creative interpretations regarding the assumption that extra regional industry would flock to the Northwest to purchase power. The assumption regarding cheap BPA power, moreover, has also proven erroneous. Finally, the provisions have tended to restrain trade. Industry which is doing business in one utility service area can be reluctant to move to a new provider for fear that it will be treated as a "new large single load" and required to pay BPA's highest rate.

e. Northwest Power Planning Council

Opinions vary on the continued usefulness of the Northwest Power Planning Council. As envisioned, it was a useful body. It is certainly the most ambitious of several congressional undertakings to better coordinate common issues shared by states which border the Columbia River system.¹⁴⁰

While the Council has been successful in serving as a forum for the central planning of a fish and wildlife program and power plan, the geo-political divisions between upriver and downriver states, the increasingly politicized nature of its decisionmaking, and the key changes in the assumptions which lay behind its creation, have greatly reduced its effectiveness in the absence of significant statutory reform.¹⁴¹ To understand the need for change, the reason for the Council's existence must be understood.

The Council was created for two reasons: to prepare a Fish and Wildlife Program and a Power and Conservation Plan. Both would give the states the key planning role they desired as regards BPA's operations. The assumptions that underlie the need for both, however, have significantly changed.

140. The Northwest Power Planning Council is only the latest of several attempts to better coordinate issues between States that share the Columbia River system. The first and only such compact to be implemented is the Washington-Oregon Fisheries Compact of 1918. See Act of April 8, 1918, Pub. L. No. 123 (consent to "Oregon and Washington...regulating, protecting, and preserving fish in the boundary waters of the Columbia River"). RCW 75.60 and ORS 507.010. The compact is used today to regulate in-river harvest under the United States v. Oregon, 666 F. Supp. 1461 (D. Or. 1987) allocating harvest among Treaty Tribes of the Columbia and the States. While not members, the Tribes participate in and abide by the decisions of the compact. Idaho and Idaho Tribes have tried unsuccessfully to join the compact.

Other pre-Power Planning Council efforts include the Columbia River Compact of 1925. It authorized Washington, Oregon, Montana, and Idaho to negotiate for "an equitable allocation and appropriation of...the water supply of the Columbia River and the streams tributary thereto." See Pub. L. 609-68

With respect to fish and wildlife, especially anadromous fish, the Power Act assumed that with enough BPA funding and a coordinated plan, there would be significant increases in the total number of returning adult salmon to the Columbia River. Thus, there emerged the Council's goal of "doubling the fish runs" by building new hatcheries. The hatcheries, however, are still largely on the drawing boards and reliance on this approach to fisheries enhancement has to a significant extent been politically and biologically discredited by Endangered Species Act initiatives which seek to protect wild fish whose genetic integrity is, said to be compromised by the introduction of large numbers of hatchery stock. The Council's Program also could not adequately address or account for changing ocean conditions, marine mammal predation, limited habitat, and continued excessive harvest. Harvest is a particularly difficult question, which is made more difficult by the National Marine Fisheries Service's conflicting goals of supporting harvest, on the one hand, while saving endangered species, on the other. The listed species are harvested in a mixed stock fishery which presently does not require the distinguishing of hatchery fish from ESA stocks.

The Council's jurisdiction on fish and wildlife is also limited to the Columbia River. It does not extend into the ocean where harvest disputes between the United States and Canada regarding implementation of the Pacific Salmon Treaty tend to exacerbate an already difficult situation. And the Council's Program, when applicable, "guides" only the hydropower operators and regulators: Bonneville, the Corps of Engineers, the Bureau of Reclamation, and the Federal Energy Regulatory Commission. Other key agencies responsible for managing fishery issues, including the National Marine Fisheries Service, the U.S. Fish and Wildlife Service, the Forest Service, the Bureau of Land Management, and the Environmental Protection

(March 4, 1925). Two Presidential appointees were to be participate in the multi-state negotiations. The compact recognized that issues including "irrigation, power, domestic, and navigation uses" would be addressed, although it was silent on fish and wildlife resources. *Id.* The authorization to enter into the compact was extended to 1927 and then lapsed.

Finally, the Pacific Northwest River's Commission is worth noting. It was initiated when the compact to authorize and allocate Columbia River waters among Washington, Oregon, Idaho, Montana, and Wyoming died. See Act of July 16, 1952, Pub. L. No. 572-82 (1952). The Commission was to study water issues. The Commission has been terminated. Exec. Order No. 12319, 46 C.F.R. 45,591 (1981).

141. The Council's Power Plan has become less relevant as customers leave BPA and the Pacific Northwest generally has a power surplus. The Fish and Wildlife Program has been superseded to a large degree by the federal government's initiatives in the Endangered Species Act.

Agency, are not obligated to "act consistently with the Program" and do not always do so. This effectively precludes an ecosystem-system approach to resource management that looks at all four "Hs" comprehensively: hatcheries, habitat, hydro, and harvest. The bottom line is that nearly two billion dollars have been spent and the trend line for fish and wildlife enhancement is only marginally improved.¹⁴²

The Council is now embarked on a "180 day review" process to address these issues, as required by section 508(c) of House Bill 1905, the Energy and Water Development Appropriations Act for 1996. Congress clearly wants "more effective regional control over efforts to conserve and enhance anadromous and resident fish and wildlife" within the Columbia River. Council relevancy in the fish and wildlife area will be determined by the results of this review, and the action, if any, that is taken regarding its recommendations.¹⁴³

The assumptions that underlie the need for a comprehensive Power Plan have also been seriously eroded. The Power Plan presupposed a regulated electric utility environment where BPA supplied most Northwest utilities with all or a large share of their power needs. As previously noted, that assumption is no longer valid. It also assumed a need for an activist initiative to encourage consumers to conserve electricity. BPA prices were believed to be too low to encourage consumers to do otherwise, and they would not do so left to their own devices. That assumption has likewise proven incorrect over time. The market place and increasing BPA rates now send the proper signal for conservation, and there is no longer any need for a statutory conservation subsidy to exist in its present form.¹⁴⁴

The Council was a noble idea, but the justification for its continued existence hangs in the balance. The assumptions that supported its creation for power planning purposes have proven erroneous, and its fish and wildlife authority is too lim-

ited. The region's governors have yet to unify around the principle that the Council will serve as their primary vehicle to coordinate natural resources and energy policy, and the geo-political divisions between upriver and downriver States have increasingly politicized the decisionmaking process. Finally, there is the issue of whether it is prudent to divide planning and implementation responsibilities. This can limit accountability for results.

The Council currently serves as a vehicle by which BPA can be "guided" to transfer ratepayer funds to state and tribal fish and wildlife and energy programs. The entitlement issues must be recognized and addressed. BPA is acting as a funding collector and the Council is one of the three bodies, together with the National Marine Fisheries Service and the Fish and Wildlife Service, responsible for distributing benefits. A preferred alternative might be for BPA to make "in lieu" payments directly to fish and wildlife managers, augmenting as necessary the federal budgets of the National Marine Fisheries Service and the U.S. Fish and Wildlife Service. The payments could be tied to BPA's financial status, expressed as a percentage of BPA's net revenue. When BPA makes money, funding levels would increase; in times of economic stress, funds would be reduced. BPA must be assured that these "in lieu" payments satisfy its environmental responsibilities; otherwise, there is no reason to make the payments.¹⁴⁵ If the states and federal agencies desire to coordinate activities among themselves, which is particularly important in the fish and wildlife area, they can use existing vehicles such as the Washington-Oregon fisheries compact, or the Columbia Basin Fish and Wildlife Authority. While this will not necessarily assure improved results, it is virtually impossible to devise a model that would do so given the strongly polarized views regarding "best science," the multitude of jurisdictions with overlapping authority, the strong personalities of fisheries managers; and the many politically active interest groups currently tracking these issues.

142. See Gerald Bouck, *Thirty Years Taught That Money Won't Save Salmon*, OREGONIAN, Oct. 20, 1995, at 7. Dr. Bouck received his doctorate from Michigan State University and has worked for BPA, the U.S. Fish and Wildlife Service, and the Environmental Protection Agency.

143. See NORTHWEST POWER PLANNING COUNCIL, DOC. NO. 96-4, PROPOSALS FOR FISH AND WILDLIFE GOVERNANCE IN THE COLUMBIA RIVER BASIN (1996); DAVID H. GETCHES, REPORT TO THE NORTHWEST POWER PLANNING COUNCIL FROM THE WORKSHOP ON FISH AND WILDLIFE GOVERNANCE (1996) (available upon request from the Northwest Power Planning Council as Doc. No. 96-3).

144. See Preston Michie, *Impacts of the Pacific Northwest Electric Power Planning and Conservation Act on the Development of Energy Resources in the Pacific Northwest: An Analysis of the Resource Acquisition Priority Scheme*, 4 U. PUGET SOUND L. REV. 285, 299-332 (1981).

145. The recent debate regarding the "sufficiency" issue loses sight of several critical facts. First, BPA's payment was not an "arbitrary cap". It was proposed to be tied to net revenues to a significant extent. Second, even if it is a cap, it can hardly be called arbitrary; it represented the single largest proposed expenditure of funds for fish and wildlife in the world. Some "cap": everyone should have such a "cap." Finally, there is no good reason for BPA ratepayers to commit to pay such staggering sums without assurances that BPA will not be sued by third parties who will find judges willing to impose orders that would cost even more and further reduce the ability of the agency to compete in the new, deregulated utility environment. It goes without saying that if BPA cannot compete and survive there will be little likelihood of money for the fish and wildlife program, except through state or federal appropriations.

Stated differently, BPA is good at its core business of power sales and transmission services, and should focus on these. BPA is not particularly good at overseeing the largest fish and wildlife program in the world, and to expect such oversight is to expect too much.¹⁴⁶

f. Fish and Wildlife

BPA's fish and wildlife responsibilities are real and will not quickly be satisfied. They are, however, of two distinct types: those undertaken to satisfy the Northwest Power Act and those undertaken in furtherance of Endangered Species Act listings.

BPA's Northwest Power Act responsibilities are an entitlement from which there is likely no escape. They should be recognized as such and treated as a cost of doing business, with BPA possibly making "in lieu" payments in the manner previously discussed.¹⁴⁷

Regarding Endangered Species Act expenditures, however, the funding process should be changed to assure that BPA has at least a "level playing field" with other federal agencies. Section 7(a)(2) of the Endangered Species Act, and implementing regulations, provides that federal agencies shall "insure that any action ... is not likely to jeopardize the continued existence of any endangered species."¹⁴⁸ The ESA does not, however, provide a means to "insure" or pay for this result; instead, appropriations must be requested for this purpose.

BPA is different: it has used the Bonneville fund to routinely include both Northwest Power Act and ESA funding in its budget, leaving to the Administration and then to the Appropriations Committees the responsibility to change the bud-

get by including "such specific directives or limitations" as may be felt needed in appropriation acts.¹⁴⁹ This is so despite the fact that the BPA is not expressly authorized to make expenditures for ESA purposes from the Bonneville fund.

This budgetary practice has developed because in many important respects, the Council's Fish and Wildlife Program and the ESA Biological Opinion measures are indistinguishable. Over time a synergy has developed between the Council Program and the ESA federal agencies efforts. They frequently overlap, and both tend to grow exponentially as first the Council and then the federal agencies attempt to show each can "do more for the fish" than the other. Bonneville ratepayers watch this "fish gamesmanship" and pay the bills.

In reauthorizing the ESA, Congress should carefully consider a provision directing that all ESA expenditures be obtained solely by the traditional appropriations process. This would need to be coupled with a recognition that BPA's Northwest Power Act fish and wildlife program is a non-ESA expenditure which should still be paid from the Bonneville fund, subject to such "directives or limitations" of the Appropriations Committees as currently prescribed by law,¹⁵⁰ or as an payments to the state and federal fish and wildlife programs in new BPA legislation to replace the Northwest Power Act.¹⁵¹

A second option exists. It would have Congress recognize that society's values have changed. Dams which were constructed primarily for power purposes are now used primarily for fish migration. It is not fair for BPA ratepayers to shoulder this de facto reauthorization of the projects. The benefit of the BPA ratepayer bargain to repay projects costs in

146. Tribes have been the recipients of substantial BPA funding, as well as federal agencies. The latter should be funded through congressional appropriations which has a built-in system of checks and balances. Tribes can receive funding in partnership with the states. There is no treaty right to such BPA ratepayer funds, although the states would as a practical matter be well served to call upon tribal expertise and treat them as sovereign partners in the attempt to implement their fish and wildlife efforts.

147. Alternatively, BPA could undertake a rulemaking to answer the still unanswered questions regarding § 4h(10) of the Northwest Power Act: what is the extent of the Administrator's mitigation obligation, and how much of that obligation has been satisfied? See 16 U.S.C. § 839b(h)(10)(A) (1994). Is it possible over time to satisfy the obligation for impacts caused by the "construction" and the continued "operation"? See *id.* What is meant by the "in lieu" provision that seemingly requires states, federal agencies, and others with fish and wildlife obligations that existed prior to the Northwest Power Act's passage to pay for those costs instead of looking to BPA ratepayers? *Id.* How shall project costs be allocated? See *id.* § 839b(h)(10)(C) (1994).

Such a rulemaking was likely anticipated by Congress when it enacted the Northwest Power Act, but it has never been undertaken and BPA's role as a provider of public benefits is so central to funding northwest fish and wildlife activities that it may be

practically impossible to do so now.

148. Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified as amended at 16 U.S.C. §§ 1531-44 (1994)).

149. 16 U.S.C. § 838(i)(b) (1994).

150. Absent a directive to BPA to make "in lieu" payments to satisfy fish and wildlife responsibilities, BPA could undertake a rulemaking to determine which of its expenditures were attributable to the ESA and which were attributable to the Northwest Power Act. Those that were primarily for ESA purposes would be subject to the same appropriations process that other agencies must follow for obtaining money to implement Biological Opinions. This would at least create a level playing field. Non-ESA expenditures, those undertaken under the Northwest Power Act, would continue to be paid directly from the fund as Congress intended.

151. The Bonneville Fund authorizes the BPA Administrator to make payments "as shall be required to carry out the purpose and provisions of the [Northwest Power Act]." 16 U.S.C. § 838i(b)(12) (1994). The latter Act specifically focuses on anadromous fish. 16 U.S.C. § 839b(h)(2)(C), b(h)(6)(E)(i)-(ii) (1994). The Administrator "shall use the Bonneville...fund and the authorities under this chapter and other laws administered by the Administrator to protect, mitigate, and enhance fish and wildlife." 16 U.S.C. § 839b(h)(10)(A) (1994).

exchange for power benefits has materially changed. Fish are a national resource. The dams should be expressly reauthorized with their capital costs assessed directly to fish and wildlife on a non-reimbursable basis. Irrigation costs now assumable by BPA would likewise become the responsibility of those who directly benefit: the irrigators. This would assure that all taxpayers, not just BPA ratepayers, share in the obligation to repay the Treasury. For a variety of reasons, including potential "scoring" problems under the Graham-Rudman Act, this is unlikely to happen.

Regrettably, no matter which alternative is chosen, there is little reason to be optimistic about the return of the great fish runs of the Columbia. If biologists cannot even agree to undertake basic research to answer such fundamental questions as whether there is a positive relationship between increased river flow and smolt survival, policy leaders can hardly be expected to craft a strategy that works. Even if the biologists could agree, until ocean salmon harvest is controlled, habitat improved, hatcheries retooled, and other non-river variables addressed, the number of returning adult salmon will remain at low levels.

VI. Conclusion

While it may be politically impossible to do so, fairness requires that all public benefits and entitlements be evaluated together. Anything short of such a far reaching assessment will be viewed by those whose benefits are offered up as unreasonable. They will be right. At the same time, the lessons of the Regional Act must be remembered: specific, complex, and highly technical legislation whose authors presume they know the future and can write it into law for all time will fail. Bonneville is a powerful agent of economic and environmental benefit to the Pacific Northwest. It must have discretion and flexibility to adjust to changed circumstances. BPA decisionmaking is best limited not through legislative fiat but by giving it the tools to adapt to change. Agencies such as BPA are best influenced by the normal and natural political processes that shape public policy formation. As the Pacific Northwest is learning, it is much easier to change policy than it is to rewrite organic statutes.

The Regional Act is largely a failure and must be significantly amended. And while BPA may fairly be faulted for agreeing to such a complex, entitlements laden law, it did so with the best of intentions and at the behest of its customers. The goal was to win approval of what has to date proven to

be a largely unneeded resource acquisition authority, and to set in place a system of public benefits and entitlements that could only be paid for so long as the Act's assumptions remained valid.

The reality today is that the assumptions that were to make the law work have largely proven wrong. As a result BPA is left with an unworkable statute which limits BPA's authority to market power, set rates, and to adjust the costs of public benefits. The statute needs wholesale rewriting if BPA is to survive.

What, then, is the case for BPA's survival? Why should it not be privatized? The answer, it is submitted, is in part that BPA is one of those rare federal agencies which actually strives to conduct its operations consistent with sound business principles, and repays with interest the investment that taxpayers have made in its facilities. Such agencies should be emulated, not eviscerated.

A second part of the answer lies in the fact that while BPA changes to better compete in a deregulated climate, it continues to bring positive economic and environmental benefits to the Pacific Northwest and the west coast in general. For more than sixty years BPA's low electric rates have benefitted consumers and served as a "yardstick" to assure that competitors do the same. During this same period, its engineers have constructed a world renown, highly reliable transmission system stretching from Canada to California. And finally, since 1980, BPA ratepayers have invested billions in socially desirable conservation, renewable resources, and fish and wildlife programs.

Before BPA is dismantled, policy and political leaders should carefully consider what will take its place. One of the risks of revolution is that it can on occasion lose sight of the good in that which is being revolted against. And truly, the electric industry and BPA are involved in a major revolution.

The lessons of deregulation teach that while in the short term consumers can benefit, in the long run companies frequently raise rates to recover what was lost during more competitive times. What will substitute for the BPA "yardstick" of low electric rates when this occurs? And who better than BPA is prepared to manage a regional transmission system with equal access for all users? Was this not one of the primary purpose underlying the Transmission System Act of 1974 which entrusted BPA with this responsibility?

Finally, the social benefits that BPA brings to the region through its financial commitment to conservation, renewable resources, and fish and wildlife enhancement should not be discounted. Without BPA funding, these programs will likely

compete on a federal and state level for appropriated dollars in an increasingly constrained financial climate. Does anyone seriously believe that they will fare as well? And while certain utilities and economists argue that their inclusion "distorts the marketplace by artificially increasing rates," there is little evidence that the public desires to sacrifice such efforts.

The Northwest has benefited immensely from the leadership of Senator Mark Hatfield (R-OR). He has picked up Senator Jackson's mantle even when it was a greater "political liability" than a "political win." For that we owe him a debt of gratitude. And to Senator Hatfield and others who placed regional economic and environmental interests over parochial benefits, we look for leadership in changing the Regional Act and revitalizing the BPA.¹⁵²

VII. Postscript

This Article was conceived in late 1994. Events have overtaken it and a postscript is appropriate. While the assumptions regarding the demise of the Northwest Power Act have proven more correct than initially imagined, the "Walls" are still "Tumbling Down" and are likely to continue to do so for the foreseeable future. BPA's "reconstruction," if that is the chosen path, is still well in the future.

From a legislative perspective, now is the time for the testing of ideas, not the time for action. While important reforms such as the debt refinancing bill have recently become law, whether and when other major legislative change will occur is far less certain and awaits the completion of the Governors' "Regional Review" process still to be fully developed is the more recent initiative of Senator Slade Gorton (R-WA), who could emerge as the successor to Senator Hatfield as the region's political leader on BPA issues. In both forums, competing visions of BPA's future are offered—visions that range from agency dismantlement to restructuring with powers more typically provided government corporations paralleling and reflecting the ongoing deregulation movement.

In the interim, Bonneville continues to change. It is in the midst of an administrative "refocus" and "reengineering effort" which may well result in the creation of several semi-independent business lines: power; transmission services; and energy services. A central corporate office could provide overall direction and coordination. This initiative may be completed as early as October 1, 1996, the start of the next fiscal year, and could go a long way toward aligning BPA with changes that are occurring in the increasingly deregulated electric utility business, prompted by the recently finalized FERC Rule for open access transmission service.

If the region's political institutions decide there is value in preserving BPA by reshaping its organic legislation, it is hoped they will seriously consider: (1) a flexible statute that allows the Administrator to react to a rapidly changing utility business as a governmental corporation; (2) a board of directors reflecting regional and federal interests and needs; (3) restructuring of the authorities of the Power Planning Council; (4) modification or repeal of all legislative benefits and entitlements to assure a competitive power product which is also priced to support BPA's ability to timely repay its Treasury obligation; and (5) a level playing field for fish and wildlife mitigation between BPA ratepayers and the general population in relation to ESA and non-ESA initiatives.

From a personal perspective, it is submitted that the powerful ideas that underlay BPA's initial creation more than fifty years ago are equally valid today. These ideas are to "assure an adequate, efficient, economical and reliable power and transmission service at the lowest possible cost consistent with sound business principles", to do so by providing a "yardstick for competition" among other electric utilities with resulting benefits to the "the general public, and particularly of domestic and rural consumers", to "timely repay the Treasury debt", and to finance key public interest programs for conservation and fish and wildlife. Whether that vision of Franklin Roosevelt, Henry Jackson, and Mark Hatfield is still valid remains to be seen.¹⁵³

152. Senator Hatfield has announced his retirement. In a March 8, 1995 address to BPA employees, he urged that the region look for a new political leader to champion BPA issues. Otherwise, he observed, the issues are passed from office to office without one individual taking clear ownership. Senator Slade Gorton (R-WA) is emerging as that new leader, and is well positioned with significant seniority on the Senate Appropriations Committee. On the Democratic side, Congressman Norm Dick (D-WA), a protégé of "Scoop" Jackson, has been active, and is a logical successor to Senator Jackson. The Pacific Northwest and BPA need strong political leaders on these issues especially at this time.

153. Those with a desire to follow these issues on a continuing basis may wish to consult <http://www.newsdata.com/ener-net/review/review.html> for all of the materials and debate surrounding the Governors' "Comprehensive Review of the Northwest Energy System." Other valuable websites include "Northwest Enernet" and the "180-Day Report: Regional Fish and Wildlife Governance," both of which are accessible from the address above or from newsdata@newsdata.com.